19

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910. [illegible]

No. 935.42

DANIEL W. BAKER, PLAINTIFF IN ERROR,

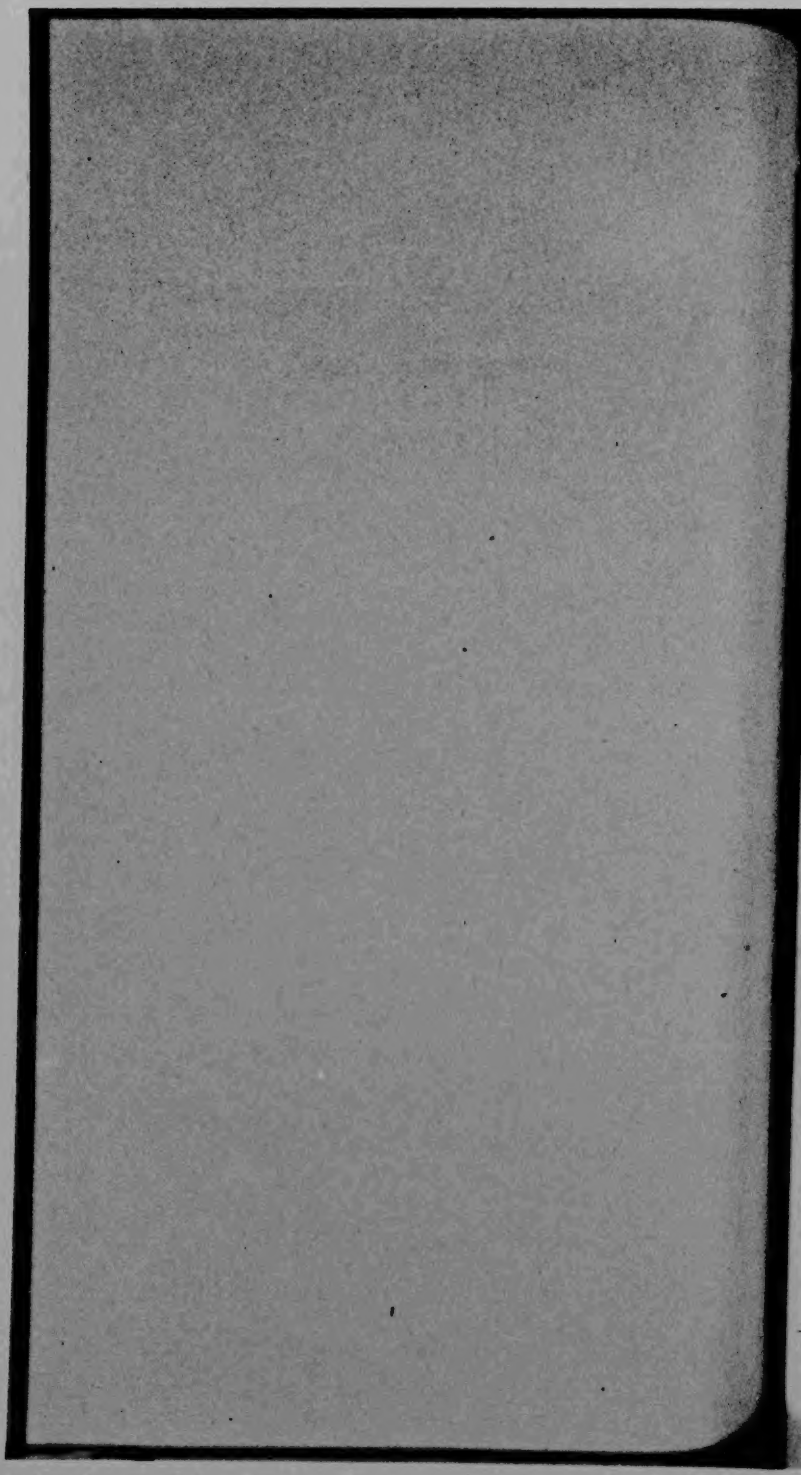
vs.

BRAINERD H. WARNER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 13, 1911.

(22,734)



(22,734)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 327.

DANIEL W. BAKER, PLAINTIFF IN ERROR.

vs.

BRAINERD H. WARNER

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

(Omitted in printing.)

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1913

Mandate.

Filed May 22, 1911

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

[SEAL.]

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between Daniel W. Baker, plaintiff, and Brainerd H. Warner, defendant, Law No. 50411, wherein the judgment of the said Supreme Court entered in said cause on the 2nd day of April, A. D. 1909, is in the following words, viz:

Now come on for hearing defendant's motions for a New Trial and in Arrest of Judgment, filed herein by his attorney Mr. J. J. Darlington, who states in open Court that he does not desire to argue said motions; whereupon, it is ordered, that said motions be, and the same are hereby overruled, and that judgment on verdict be entered. Wherefore, it is considered and adjudged, that the plaintiff herein recover of defendant herein the sum of Ten Thousand Dollars ($10,000.00) for his damages as aforesaid assessed by reason of the premises, with interest from this date together with costs of suit to be taxed by the Clerk, and have execution thereof.

From the foregoing, the defendant by his attorney in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a Supersedeas, is hereby fixed in the sum of Twelve Thousand (12,000) Dollars.

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And Whereas, in the present term of January, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjuged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said defendant, Brainerd H. Warner, recover against the said plaintiff, one hundred and thirteen dollars and forty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to arrest the judgment.

MARCH 6, 1911.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 3rd day of May, in the year of our Lord one thousand nine hundred and eleven.

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Costs of Defendant.

Clerk	$17.40
Attorney	5.00
Printing Record	91.00
	$113.40
	43.88
	$157.28

Supreme Court of the District of Columbia.

MONDAY, *May 22d*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * * * *

No. 50411. At Law.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINERD H. WARNER, Deft.

Come here again the respective parties, by their attorneys, and the defendant presents to the Court the mandate of the Court of Appeals herein, and moves for judgment thereon; whereupon, it appearing by said mandate that the judgment of this court entered herein on April 2, 1909, is reversed with costs, and that this cause is remanded to this court with directions to arrest the judgment; it is considered that the defendant recover of the plaintiff the sum of one hundred and fifty-seven dollars and twenty-eight cents ($157.28) for his costs of appeal herein, and thereof have execution, and that the judgment heretofore rendered in this cause be, and the same is reversed, and that judgment in this said cause be, and the same is hereby arrested; to which judgment for costs and in arrest, the plaintiff duly excepts in open court and elects to stand upon his declaration and the record herein; and thereupon further, it is con-

sidered that the plaintiff take nothing by his writ, and that the defendant go thereof without day, with his costs of suit to be taxed by the clerk, and recovered of the plaintiff, and thereof have execution: from which judgment the plaintiff by his attorneys of record, in open court, notes an appeal, which is allowed, and the penalty of the appeal bond to operate a supersedeas herein is fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

Memorandum.

May 26, 1911.—Supersedeas bond on appeal approved and filed.

Stipulation.

Filed May 31, 1911.

It is this 29th day of May, 1911, hereby stipulated and agreed by and between the respective parties in this cause, by their counsel, that the clerk shall prepare the transcript of record on the pending appeal, and include therein—

(1) All of the matters and things contained in the transcript of record on the first appeal, using therefor a printed copy of such transcript, which is furnished herewith.
(2) Mandate of Court of Appeals on former appeal.
(3) Judgment et cetera on said mandate.
(4) Memorandum of approval and filing of appeal bond.
(5) This stipulation.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff.
J. J. DARLINGTON,
W. C. SULLIVAN,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

NITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District Columbia, hereby certify the foregoing pages numbered from 1 90, both inclusive, to be a true and correct transcript of the record ording to directions of counsel herein filed, a copy of which is de part of this transcript, in cause No. 50111 At Law, wherein niel W. Baker is Plaintiff and Brainerd H. Warner is Defendant, the same remains upon the files and of record in said Court.
In testimony whereof, I hereunto subscribe my name and affix seal of said Court, at the City of Washington, in said District, s 1st day of June, 1911.
[SEAL.]

J. R. YOUNG, *Clerk.*
By ALF G. BUHRMAN,
Ass't Clk.

(Endorsed:) District of Columbia Supreme Court. No. 2310. Daniel W. Baker, Appellant, vs. Brainerd H. Warner. Court of Appeals, District of Columbia. Filed Jun- 1, 1911. Henry W. Hodges, Clerk.

THURSDAY, *June 1st, A. D.* 1911.

No. 2310.

DANIEL W. BAKER, Appellant,
vs.
BRAINERD H. WARNER.

On motion of Mr. F. J. Hogan, of counsel for the appellant, It is ordered by the Court that the printing of the record in the above entitled cause be dispensed with. Whereupon this cause was submitted to the consideration of the Court on the transcript of record filed herein.

No. 2310. April Term, 1911.

DANIEL W. BAKER, Appellant,
vs.
BRAINERD H. WARNER.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and it appearing to the Court that the judgment appealed from was entered in conformity with the mandate of this Court: on consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

PER MR. CHIEF JUSTICE SHEPARD.
June 1, 1911.

In the Court of Appeals of the District of Columbia.

No. 2310.

DANIEL W. BAKER, Appellant,
vs.
BRAINERD H. WARNER, Appellee.

Petition for Writ of Error.

Now comes Daniel W. Baker, appellant herein, and says that on the first day of June, 1911, this court entered judgment herein in favor of the appellee, Brainerd H. Warner, by which the judgment of the Court below was affirmed with costs, in which said judgment of this Court, and the proceedings had prior thereto, certain error-

were committed to the prejudice of this appellant, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, the appellant prays that a writ of error may issue in this behalf from the Supreme Court of the United States, for the correction of the errors so complained of; that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; that the penalty of a bond for costs may be fixed by this Court; that citation may be granted; and that said judgment may be reviewed and reversed.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Appellant.

(Endorsed:) No. 2310. Daniel W. Baker, Appellant, vs. Brainerd H. Warner, Appellee. Petition for Writ of Error. Court of Appeals, District of Columbia. Filed Jun- 1, 1911. Henry W. Hodges, Clerk.

* * * * * * *

THURSDAY, *June 1st, A. D.* 1911.

No. 2310.

DANIEL W. BAKER, Appellant,
vs.
BRAINERD H. WARNER.

On motion of Mr. F. J. Hogan, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue and the bond to act as supersedeas is fixed at the sum of five hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you between Daniel W. Baker, Appellant, and Brainerd H. Warner, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of June, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Daniel W. Baker, as principal, and Edward P. Schwartz, as surety, are held and firmly bound unto Brainerd H. Warner in the full and just sum of Five Hundred Dollars to be paid to the said Brainerd H. Warner, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *be* made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of June, in the year of our Lord one thousand nine hundred and ——.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Daniel W. Baker, Appellant, and Brainerd H. Warner, a judgment was rendered against the said Daniel W. Baker and the said Daniel W. Baker having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Brainerd H. Warner citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Daniel W. Baker shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DANIEL W. BAKER. [SEAL.]
EDWARD P. SCHWARTZ. [SEAL.]

Sealed and delivered in the presence of—

JOSEPH C. SHEEHY.
CHAS. M. BIRCKHEAD.
As to E. P. S.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2310. Daniel W. Baker, Appellant, vs. Brainerd
. Warner. Supersedeas Bond on Writ of Error to Supreme Court
. S. Court of Appeals, District of Columbia. Filed Jun- 1, 1911.
Henry W. Hodges, Clerk.

NITED STATES OF AMERICA, *ss:*

Brainerd H. Warner, Greeting:

You are hereby cited and admonished to be and appear at a Su-
eme Court of the United States, at Washington, within 30 days
m the date hereof, pursuant to a writ of error, filed in the Clerk's
lice of the Court of Appeals of the District of Columbia, wherein
niel W. Baker is plaintiff in error, and you are defendant in error,
show cause, if any there be, why the judgment rendered against
said plaintiff in error as in the said writ of error mentioned,
uld not be corrected, and why speedy justice should not be done
the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court
Appeals of the District of Columbia, this 1st day of June, in the
r of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

ervice acknowledged June – , 1911.

J. J. DARLINGTON,
Counsel for B. H. Warner.

Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 1,
1. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

Henry W. Hodges, Clerk of the Court of Appeals of the District
olumbia, do hereby certify that the foregoing printed and type-
ten pages numbered from 1 to 99 inclusive contain a true copy
e transcript of record and proceedings of said Court of Appeals
e case of Daniel W. Baker, appellant, vs. Brainerd H. Warner,
2310, April Term, 1911, as the same remain upon the files and
ds of said Court of Appeals.

testimony whereof I hereunto subscribe my name and affix
al of said Court of Appeals, at the City of Washington, this 6th
f June A. D. 1911

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

In the Supreme Court of the United States, October Term, 1912.

Number 327.

DANIEL W. BAKER, Plaintiff in Error.
vs.
BRAINERD H. WARNER.

Stipulation.

It appearing that the first eighty-four pages of the transcripts of record in numbers 326 and 327 are identical, it is stipulated and agreed by and between the respective parties hereto, by their counsel, that the first eighty-four pages of the transcript of record in number 326 may and shall be considered and read as part of the transcript of record in number 327 on any and every hearing of this cause, and that the printed record in this cause shall embrace only pages eighty-five to the end of the transcript of record herein, exclusive of the assignments of error which are contained on pages ninety-two to ninety-five of the transcript, both inclusive, the assignment of errors in numbers 326 and 327 being identical.

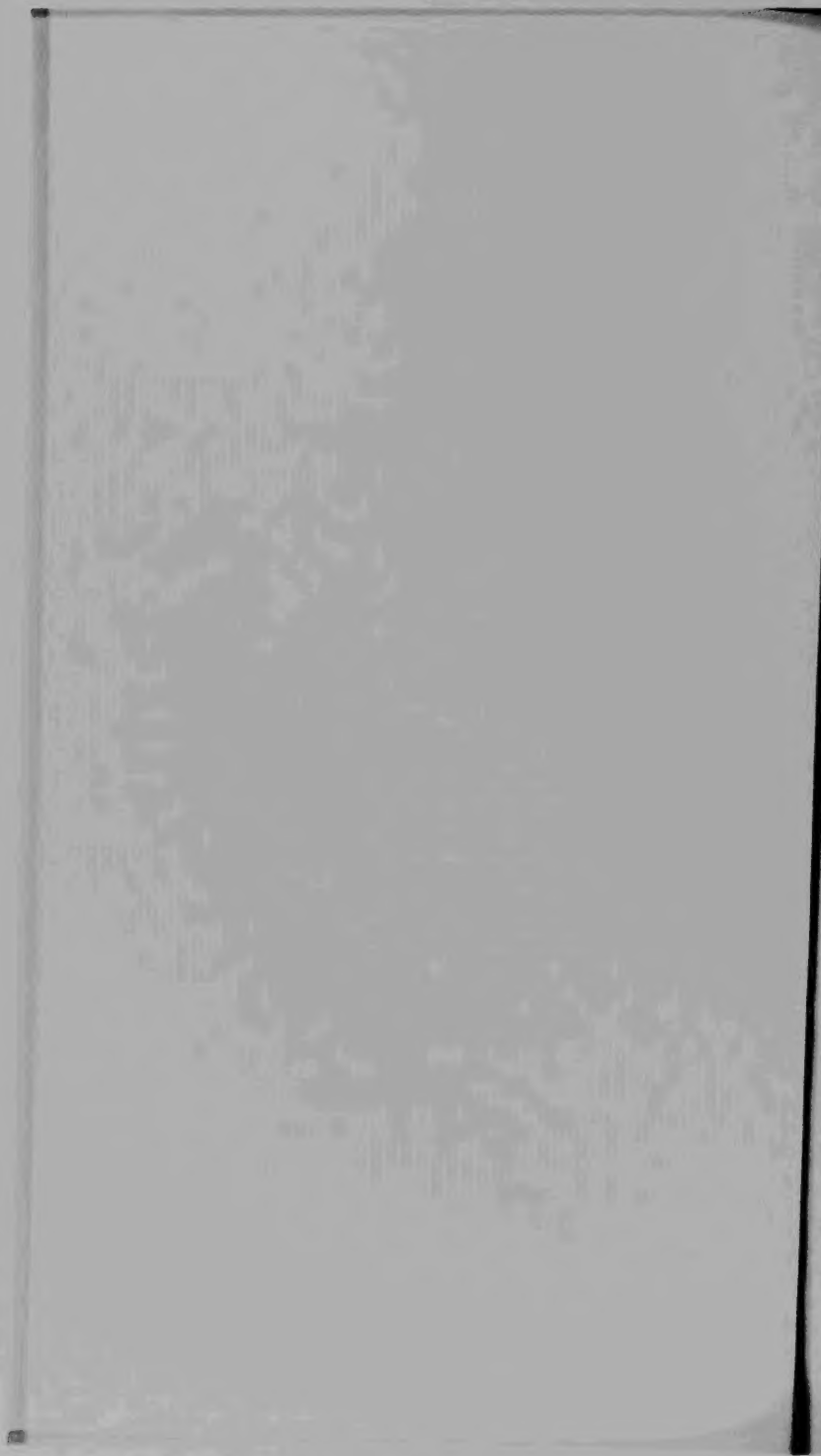
FRANK J. HOGAN,
HENRY E. DAVIS,
Attorneys for Plaintiff in Error.
J. J. DARLINGTON,
W. C. SULLIVAN,
Attorneys for Defendant in Error.

Washington, D. C., April 17, 1913.

[Endorsed:] October Term, 1912. Number 327. Daniel W. Baker, Plaintiff in Error, vs. Brainerd H. Warner. Stipulation. Baker, Sheehy & Hogan, Attorneys at Law, Evans Building, Washington, D. C.

[Endorsed:] File No. 22,734. Supreme Court U. S., October Term, 1912. Term No. 327. Daniel W. Baker, Pl'ff in Error, vs. Brainerd H. Warner. Stipulation to omit parts of record in printing, &c. Filed April 17, 1913.

Endorsed on cover: File No. 22,734. District of Columbia Court of Appeals. Term No. 327. Daniel W. Baker, plaintiff in error, vs. Brainerd H. Warner. Filed June 13th, 1911. File No. 22,734.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 41 AND No. 42.

DANIEL W. BAKER, *Plaintiff in Error.*

v.

BRAINARD H. WARNER, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

A. Subject Index.

B. Cases Cited.

C. Text Books and Encyclopedias Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 41 AND No. 42.

DANIEL W. BAKER, *Plaintiff in Error,*

v.

BRAINARD H. WARNER, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action for libel. In No. 41, the Court of Appeals reversed (Record, 95-96) a judgment (Record, 11)

of the Supreme Court of the District of Columbia in favor of the plaintiff in error for $10,000, and remanded the case to the trial court with directions to arrest the judgment, and to the judgment of the Court of Appeals the plaintiff in error sued a writ of error (Record, 100) to this Court.

In No. 42 the Court of Appeals affirmed (Record, 88) a judgment (Record, 86-87) of the trial court entered on the mandate, and to this judgment of the Court of Appeals the plaintiff in error also sued a writ of error (Record, 89) to this court.

The two writs of error to the two judgments were sued in order to foreclose any question of jurisdiction based upon the lack of finality in the first judgment of the Court of Appeals. *Earl v. Myers*, 207 U. S., 244, 245, 251.

For convenience of reference, the plaintiff in error will hereinafter be called the plaintiff, and the defendant in error, the defendant.

The results in the Court of Appeals have already been stated, and as well the reasons for the two writs of error. The opinion of that court is reported in 36 App. D. C., 493. A stipulation (R., p. 92) has been filed here, covering the subject of printing both records. While there are two judgments, yet there is but one case in merits. This brief is intended to cover both writs of error.

Stating them in order in which the appear in the opinion of the Court of Appeals, the principal question decided by that court and involved and thus presented are, (1) whether Proll's testimony was admissible, (2) whether the declaration showed any cause of action, (3) whether there was error in granting the plaintiff's first prayer, and (4) whether there was error in granting the plaintiff's second prayer. We shall not follow that order in this brief.

As the plaintiff's declaration, which was not demurred to, was held fatally defective in the Appellate Court, in the

following statement of the proceedings below we shall at the outset present rather fully the allegations of the two counts of the declaration.

First Count of Declaration.

The declaration was filed March 31, 1908, and, in the first count (R., pp. 1-5), charges that the plaintiff, since September 1, 1905, has been and now is the United States Attorney for the District of Columbia; as such it is his duty to prosecute all violations of the criminal law in this District; the Washington Jockey Club owns a race track in the District whereon are held horse races; when the libel was published March 28, 1908, horse races were daily taking place at the track, having commenced March 23, 1908, and continuing daily until the publication of the libel, and advertised to continue until April 14, 1908, a period of three weeks, commonly known as the Spring Meet; during the races persons congregate on the track and make bets or lay wagers on the results; if such laying of bets, or making of wagers at the race track, constitutes a violation of any of the penal laws in force in the District, it is the plaintiff's duty to prosecute the persons guilty of such violation; on January 25, 1908, the plaintiff laid before the Grand Jury a charge against one John Walters that Walters, in taking wagers at the race track, was setting up a gaming table in violation of the gambling act in force in the District; the Grand Jury, January 28, 1908, presented and indicted Walters, charging him with a violation of the gambling act; February 8, 1908, Walters demurred to this indictment, and March 1, 1908, his demurrer was sustained by the Supreme Court of the District of Columbia, the presiding justice holding that the laying of bets or making of wagers at the race track was not a violation of any law in force in the District; the

plaintiff, in his official capacity, is now engaged in prosecuting an appeal from the order sustaining the demurrer, for the purpose of having the Court of Appeals of the District of Columbia determine whether or not such laying of bets or making of wagers at the race track is unlawful and contrary to the statute; pending this appeal, the plaintiff, conforming himself to the law as declared by the Court in sustaining the demurrer to the Walters indictment, has not ordered warrants for the arrest of, nor laid before the Grand Jury charges against, any persons for laying bets or making wagers on horse races at the track; the defendant, March 28, 1908, was, and still is, a Republican candidate for nomination for the office of Representative in Congress from the Sixth Maryland District; the Washington Herald Company has been publishing in its paper, the Washington Herald, for many days previous to, and since, March 28, 1908, numerous articles or advertisements in support of the defendant's candidacy, and these articles the defendant has caused to be published in the Herald, and has paid that Company for publishing them; that Company, in addition to publishing the Herald, has sold and circulated it in the District and throughout the United States, and in adjacent American countries, and in foreign countries; the defendant, well knowing the premises, but maliciously, wickedly, and fraudulently contriving to injure the plaintiff in his good name, fame, and credit, and to bring scorn, public scandal, infamy, and disgrace on him, and to injure him in his office as United States Attorney for the District of Columbia, did, March 28, 1908, compose, publish, and cause and procure to be composed and published, of and concerning the plaintiff, and of and concerning the plaintiff, and of and concerning the office of the plaintiff, in the Herald of March 28, 1908, a false, scandalous, malicious, and defamatory libel, as follows:

Warner's Political Contest.

l. Pearre said in his great onslaught on Mr. ner a few days ago:

regard his candidacy as a joke. If I had a key and hand-organ, I could get up a crowd any-e."

is was a fine expression for a statesman, but not ing in dignity so much as a Justice of the Su-e Court of the District of Columbia who, with nited States district attorney, went to Rockville Saturday to attend a conference of Mr. Warner's ies and determine what ammunition was needed feat him.

e question now is, Where does the money come in the contest against Mr. Warner?

w about the race track?

LAWYER.

ere digress from our statement of the contents of ration to set forth the fact, as proved at the trial 4), that two days later, in the Washington Herald 30, 1908, the defendant published the following his own composition:

Warner's Campaign for Congress.

What a desperate fight he has on hand! Justice Gould, of the United States Supreme Court of the District of Columbia, and Hon. D. W. Baker, United States District Attorney for the District of Columbia, are against him.

They both attended the anti-Warner conference at Rockville a week ago Saturday, where a general discussion was indulged in as to how Warner could be beaten.

Why not stay at home and try and close the race-track scandal? ROCKVILLE.

By the libel of March 28, 1908, the defendant meant, and intended to convey, and actually conveyed the meaning, that the plaintiff entered into a conference with Judge Gould and other persons at Rockville at the time stated for the purpose of determining what funds were necessary, and how the same should be raised, to be used in the campaign on behalf of Mr. Pearre against the defendant for the nomination, and that the plaintiff was obtaining money or funds for use in the campaign from the Washington Jockey Club, or the persons engaged in laying bets or making wagers on the races at the track, or from some other per-

or persons interested in the race track or in the laying
ts or the making of wagers thereat, and meaning and
ling to convey and actually conveying that the plain-
as and is corrupt in the conduct of his official duties
laying charges before the Grand Jury and in not
cuting in the courts the persons laying bets or making
s on the races at the track, in consideration of con-
ions of money for use in the contest against the de-
nt from some company, person, or persons interested
race track or the races, or the betting; this false,
alous, malicious and defamatory libel was composed
ublished, and caused and procured to be composed
ublished by the defendant, of and concerning the
ff, the defendant meaning and intending thereby to
that the plaintiff was a corrupt, dishonest and un-
person, and was being influenced in the discharge
official duties by the fact that some person or per-
or company, interested in the race track, or in the
hereon, or in having betting, wagering, and gambling
ed thereat, was contributing money to be used
the defendant's candidacy; by means of this false
ndalous libel, the plaintiff has been and is very
injured in his good name, fame, and reputation,
aught into scorn, scandal, infamy, and disgrace, in
ers persons, by reason of the libel, suspected and
, and still do suspect and believe, the plaintiff to
y of the acts set out and charged and intended to
ged in the libel, and to be guilty of the bad and im-
conduct so charged of and concerning him, and
reason of the libel, believed the plaintiff to be a
t and unworthy person, and to be guilty of the
lleged of him as the United States Attorney for the
of Columbia; and the plaintiff claims fifty thousand
damages.

Second Count of Declaration.

This count (R., pp. 5-8) is identical with the first, except that it narrows the allegation of the defendant's meaning, and states that the defendant published the libel, meaning and intending to convey, and actually conveying, that the plaintiff, in the performance of his official duties, has acted and is acting corruptly, and was and is being influenced in the discharge of his official duties by the fact that some person or company, interested in the race track, or in the horse races thereon, or in having betting, wagering, and gambling permitted or carried on thereat, was contributing money to be used against the defendant's candidacy.

Plea.

To this declaration, April 15, 1908, the defendant pleaded the general issue (R., p. 9), and interposed no demurrer or special plea of any kind. Issue was joined (R., p. 9) April 18, 1909, by plaintiff on the defendant's plea.

Evidence.

The evidence produced at the trial was preserved in a bill of exceptions (R., pp. 12-72).

Every allegation of the declaration was conclusively proved on the trial. It was proved that the plaintiff was United States Attorney for the District of Columbia at the time of the publication complained of; that at that time there was in said District a race track at which were being had races of horses; that at that track betting or making of wagers on the result of said races was being carried on; that the plaintiff as District Attorney had instituted prosecution against persons for making bets at said race track, and carrying on book-making there, and that on March 1, 1908, the first day of the month in which the libel was pub-

lished by defendant, a justice of the Supreme Court of the District of Columbia had sustained a demurrer to an indictment which had set forth in several counts, and with much detail, exactly the acts done by the book-makers at the race track, which it was contended by the plaintiff in his official capacity violated the law of the District of Columbia against setting up a place for gaming; that after the action of the trial court in sustaining that demurrer, the plaintiff had prosecuted an appeal to the Court of Appeals of the District of Columbia, and that pending the outcome of that appeal he was conforming himself in his official conduct to the judicial decision construing the law against gaming, which then stood unreversed; that the defendant was engaged in a contest in the County of Montgomery, Maryland, for nomination as a candidate for the office of Representative in the Congress of the United States from the Congressional District embracing the said county; that his opponent in said contest for such nomination was Colonel George A. Pearre, in the said article mentioned; that in said contest the plaintiff supported the candidacy of the said Pearre and opposed that of the defendant; that the defendant wrote and procured the publication of the said article, the copy sent to the publishing newspaper being entirely in the handwriting of the defendant, and that he paid for its publication in the newspaper mentioned; and —

> "It was conceded that there was a public agitation in the District of Columbia commencing in March, 1908, and extending until after the middle of April, 1908, against permitting book-makers to operate at the Bennings race track, and that public officials, private citizens, and the press, were insisting that the plaintiff, as United States District Attorney, should institute further prosecutions against gambling at the race track;

and that the article complained of in plaintiff's declaration was published by the defendant while this public agitation was going on."

(R., p. 15.)

And the defendant himself, as a witness at the trial in his own behalf, testified respecting conditions existing in this community when he published the articles complained of—

"That the air had been full of this race track business for a long time past; defendant's attention had been called to it, he had, himself, endeavored to aid in breaking up the race track and pool selling, that objections to it were coming from every class in the community, from mothers, fathers, teachers, preachers, *and it all centered, whether justly or not, on the office of the United States District Attorney.*"

The evidence tended to show that during this agitation, and because of the decision of the trial justice to the effect that the provisions of the Code of Law in force in the District of Columbia did not reach betting and book-making at the race-track, which was situated at a place about three miles distant from the boundaries of the city of Washington, despite this agitation plaintiff did not institute further prosecution against the persons engaged in betting on horse racing at the said race track. That it was in this situation in the District of Columbia that the defendant published on March 28, 1908, the libel complained of.

The defendant took the witness stand in his own behalf and testified at length respecting the intent on his part in publishing the article complained of (R., p. 57-68). He testified that by the term "ammunition" in his advertisement he had reference to money being used in the congressional campaign against him; that he considered that

there were at the conference at Rockville, referred to in his said advertisement, in violation of the spirit of the civil service, several employes and officials of the United States Government, among them the plaintiff, a United States District Attorney (Record, p. 57); that this was a circumstance which defendant thought proper to put up for the consideration of the readers of the newspapers; that his contention had rather been attracted by the violation of the civil service regulation than any personal attack made on him by the plaintiff; that he felt that plaintiff had no right to indulge in active participation in politics, which defendant claimed was in violation of the laws and of the civil service rules (R., p. 60); that he thought the plaintiff, though a presidential appointee, was within the civil service regulations prohibiting one under them from seeking to influence voters by going around among them and soliciting their support for any candidate; defendant in great detail set forth quotations from the civil service regulations, and orders of two Presidents of the United States respecting political activity by civil service office holders and testified "that the civil service laws and regulations were in his mind at the time he published the article in suit" (R., p. 61); defendant identified, and there were received in evidence without any objection whatever, two letters written by him to the Attorney General of the United States complaining against plaintiff for his activity in opposition to defendant's congressional aspirations, making charges against the plaintiff of scandalous conduct, and announcing "I am personally and financially responsible for any statement I may make" (R., p. 63); these communications by defendant to the Attorney General respecting the plaintiff were dated nine and seven days, respectively, prior to the publication of the libel in suit; defendant also identified as having been written by him to the plaintiff, and there

was admitted in evidence without objection, a letter dated March 19, 1908, nine days before defendant published the libel, in which defendant indicated the possibility of his taking some future action against the plaintiff; defendant specifically denied having solicited in his own behalf the active support in his political campaign of one William A. Kroll, a civil service employe of the Government, and explained certain communications sent by defendant to Kroll, which defendant identified (R., pp. 65-67); defendant testified that he "knew that Kroll was a classified civil service employe of the Government" (R., p. 66); that in publishing the article of March 28 "he wanted to know where the money was coming from, whether from these Government employes or whether it was given through Mr. Pearre or through the plaintiff; that he expected anybody who read the article to answer it, if he dared to do so; that the public had a right to expect an answer, and that the defendant had the expectation that either one of the parties mentioned dared not reply to it (R., p. 67); that when he printed the article "how about the race track," he expected to hear from the District Attorney in the papers in response to that advertisement (R., p. 67).

In rebuttal plaintiff called as a witness the said William A. Kroll, referred to above, who testified, over the objection and exception of defendant, that he had visited defendant's office; that his first visit to that office was in response to a request from defendant; that defendant referred to his campaign against Congressman Pearre, and proposed that the witness assist him in Montgomery County, and that he would also like witness to go to Allegheny County and work in defendant's behalf; that defendant would see that witness did not lose anything and that so far as the civil service was concerned, defendant would see that witness was protected, and that defendant would see to it that

witness got leave of absence from his civil service employment for the purpose of going into the said congressional campaign to work for defendant (R., pp. 69-70).

In the course of the testimony, the whole history of prosecutions for gambling at the Bennings race track, situated in the District of Columbia, about three miles beyond the boundaries of the Cities of Washington and Georgetown, was gone into in detail. It is not believed necessary to set out in this statement of the case the evidence so adduced. The court is, in this connection, referred to the provisions of section 869 of the Code of Law for the District of Columbia, in force in this District since 1902, and at the time of the publication of the libel here in question, which section is as follows:

> "It shall be unlawful for any person or association of persons in the Cities of Washington and Georgetown, in the District of Columbia, or within said District, within one mile of the boundaries of said cities, to bet, gamble or make books or pools on the result of any trotting race, or running race of horses, or boat race, or race of any kind, or on any election or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both."

It was twice held in the Supreme Court of the District of Columbia, as unfortunately it was necessary for the court to hold, that under the above quoted act of Congress, betting and the making of books on races or games of chance while prohibited in the cities of Washington and Georgetown, and anywhere in the District within one mile of the boundaries of said cities, was not prohibited, or made unlawful, at any point in the District of Columbia beyond the one

mile limit. It was because of this legislation, quite evidently drawn so as not to interfere with betting and book-making at the Bennings race track, that the courts were powerless to prevent betting and book-making at that track, and that the efforts of the plaintiff to successfully prosecute persons for betting and making books at the track proved futile.

Defendant's Motion to Direct Verdict.

At the close of the evidence, the defendant moved the court to direct a verdict (R., p. 72) because of certain alleged defects in the declaration, on the ground that no basis is laid in either the inducement or averment, or colloquium, supporting the meaning attributed to the libel, and particularly because there is not found in either the inducement or colloquium any allegation that the Jockey Club, or the book-makers, or other persons interested in gambling at the race track, were sources from which the plaintiff, by reason of his official position or otherwise, might unlawfully or improperly obtain money; or any allegation that the words complained of were written or published with reference to any illegal or improper obtaining of money by the plaintiff from the race track, Jockey Club, bookmakers, or other persons interested in the race track; or that the words were written with reference to the non-prosecution of the race track gamblers, or any other official non-performance of duty by the plaintiff; or that the words were written with reference to the obtaining of money at all, or with reference to the Jockey Club, its race track, or any race track gamblers, "all of which averments, though essential to be contained in the inducement or colloquium, *were left entirely to the innuendo*, which is not the subject of proof, is not traversable, and is incapable of comprising or eking out the cause of action." The court overruled this motion.

This motion went only to the pleadings and not to the evidence. A declaration can be tested by a demurrer in the first instance; it can not be tested by a demurrer to the evidence; it can be tested by a motion in arrest, but such motion does not lie until after verdict; and if such motion be seasonably presented, the court can then consider a defendant's objections to a declaration.

PLAINTIFF'S PRAYERS FOR INSTRUCTION.

At the conclusion of all the evidence, the plaintiff asked, and the court granted, the following instructions, among others (R., pp. 72, 73):

"1. If you find from the evidence that at the time of the publication of the article described in the declaration the following were facts, namely:

(1) the plaintiff was United States Attorney for the District of Columbia;

(2) there was in said District a race track at which were being had races of horses;

(3) at that track betting or making wagers on the results of said races was being carried on;

(4) it was believed or claimed by some that the said betting or laying of wagers, or the permitting of the same, could be prevented by the prosecution in that behalf by the plaintiff as such District Attorney of the persons engaged in or permitting the said betting or laying of wagers;

(5) the plaintiff in fact did not prosecute the said persons or any of them;

(6) the defendant was engaged in a contest in the County of Montgomery, State of Maryland, for nomination as a candidate for the office of Representative in the Congress of the United States from the Congressional District embracing said County;

(7) his opponent in said contest for such nomination was the certain Pearre, in the said article mentioned;

(8) in the said contest the plaintiff supported the candidacy of the said Pearre and opposed that of the defendant; and

(9) the defendant wrote and procured the publication of the said article;

Then you are instructed, as matter of law, that the said article is libelous and that your verdict should be for the plaintiff, and that the only question for your determination is what amount of damages the plaintiff is entitled to recover of the defendant by reason of the publication of the said article."

"2. If you find that the article mentioned in the declaration was composed and its publication procured by the defendant, then you are instructed that from the publication of such article, the law implies malice on the part of the defendant, and that, without regard to whether there was any actual malice on the part of the defendant in preparing and having published the article in question, the plaintiff is entitled to recover compensation for the injury done to his reputation by the tendency of such publication to bring him into disgrace and disrepute among those who knew him personally or by reputation, and for the mental suffering (if you find that he has so suffered) caused by such publication."

The Court of Appeals held that the granting by the trial court of the above quoted instructions to the jury constituted error.

DEFENDANT'S PRAYERS FOR INSTRUCTION.

Among others, the defendant requested and the court granted the following instructions (R., p. 76):

"If the jury believe from the evidence that the true intent and meaning of the defendant, in his reference to the race-track, contained in the article published in the Washington Herald of March 28, 1908, was to inquire what the complainant was doing or intended to do about the operations of the so-called bookmakers

then in progress at the Bennings race-track, and to suggest or complain that the plaintiff's time and attention should be directed to the prosecution of the said booknakers and to the suppression of their said operations, rather than to the part he was taking in the contest for the Republican nomination to Congress in Montgomery County, Maryland; that the said intended comment and criticism were fair and reasonable under the conditions then existing at the said race-track, and the operations of the bookmakers then being carried on there; and that the intent and meaning of the defendant in publishing the said article was not to charge or intimate that the plaintiff was obtaining or seeking to obtain money for the said contest against the defendant, from the said bookmakers or other persons connected with the said race track, in consideration of the plaintiff's failure to prosecute them or to interfere with their said operations; and shall further find that the defendant was not guilty of actual malice as hereinafter defined, in the instruction given by the court, the plaintiff is entitled to recover such sum, and such sum only, as the jury shall find from the evidence will be fair and just compensation to him for the damages sustained by him in consequence of the publication of the said article."

Charge of the Court.

In addition to the special instruction granted, the trial court delivered a general charge to the jury (R., pp. 79-83). No objection whatever was made or exception taken to the general charge of the court by either party.

Verdict.

The jury returned a verdict for the plaintiff, and assessed damages against the defendant in the sum of ten thousand dollars.

Motion in Arrest.

March 19, 1909, the defendant moved in arrest (R., pp. 9-10), because no basis is laid in either the inducement or the colloquium of the declaration to admit of the construction of the article in suit given by the court, or any construction of a libelous or actionable character; because neither the inducement nor the colloquium alleges that the Jockey Club or bookmakers, or any one interested in gambling at the race track were sources from which the plaintiff, by reason of his official position or otherwise, might unlawfully or improperly obtain money, because neither the inducement nor the colloquium of the declaration alleges that the words complained of were written or published with reference to any illegal or improper obtaining of money by the plaintiff from the Jockey Club, its race-track gamblers, or any one interested in the Jockey Club, its race-track, or gambling thereat or thereabout; because neither the inducement nor the colloquium alleges that the words complained of were written or published with reference to the non-prosecution of the race-track, gamblers, or with reference to the performance or non-performance of any official duty owing by the plaintiff; and because neither the inducement nor the colloquium alleges that the words were written or published with reference to the obtaining of money at all, or with reference to the Jockey Club, or its race-track, or to gamblers or gambling at its race-track, or to any race-track, gamblers, or gambling at any place or at any time.

This motion was overruled (R., p. 11) April 2, 1909, after the defendant's attorney "states in open court that he does not desire to argue" said motion. The motion in arrest is a substantial repetition of the defendant's motion (R., p. 72) for a directed verdict. In the latter motion he expressly conceded that all of the averments which he com-

plains were deleted from the inducement or colloquium, "were left entirely to the innuendo." Concerning the complaint of the defendant as to the alleged omissions from the inducement or colloquium, the Court of Appeals says (R., p. 88) that nowhere in the declaration does the equivalent of the omitted allegations appear "except indirectly in the innuendo." Again, that court says (R., p. 79) that nothing is contained in the declaration "except in the innuendo" to indicate the declared meaning of the libel.

The defendant's objection to the declaration was not that the essential averments were omitted, but that they were misplaced,—that is to say, they were in the innuendo, but not in the inducement or colloquium where the defendant and the court below thought they should be; and this defect of form, if it exists at all, was the basis upon which the court below held the declaration so fatally defective that judgment should be arrested.

Judgment and Appeal.

The defendant having declined to argue his motions for new trail and in arrest of judgment, the trial court entered judgment (R., p. 11) on the verdict in plaintiff's favor. From this judgment the defendant perfected his appeal (R., p. 11) to the Court of Appeals of the District of Columbia.

Opinion and Judgment of the Court of Appeals.

In its opinion (R., pp. 85-95) the Court of Appeals says that the declaration must be held fatally defective (R., p. 92), and that it wholly fails to state a cause of action; this declaration and libel must be tested by its sufficiency as one in slander for the same words if spoken (R., pp. 88, 90-91); the declaration is bad in substance because the defamatory meaning must be set out in the *inducement*, and this meaning or application must appear by averment in the *collo-*

quium (R., p. 91), and not elsewhere; if the particular meaning ascribed to the libel by the innuendo is not fully borne out by the publication itself, the action can not be maintained even though the article is otherwise libelous (R., pp. 88, 89-91); the writing declared on is not libelous or actionable on its face (R., pp. 91-92); the libel declared on is not actionable because the words are not actionable in themselves (R., p. 88); the libel declared on is not actionable unless the same words, if spoken, are actionable as slander (R., pp. 88, 90-92). This libel, which the defendant composed and caused to be printed and published in a newspaper of large circulation, maliciously contriving to injure the plaintiff in his good name, fame, and credit, and to bring scorn, public scandal, infamy and disgrace on him, and to injure him in his office of United States Attorney, is not actionable because (R., p. 88) "the words spoken" will not (R., p. 88) "subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment," and that (R., p. 88) measured by this test, the words used in the publication are not in themselves actionable. It was error (R., p. 93) to grant the plaintiff's first instruction (R., pp. 72-73) to the jury; it was also error (R., p. 94) to grant the plaintiff's second instruction (R., p. 73) to the jury. The writing declared on amounts to nothing more than a permissible criticism of the conduct of the plaintiff in his official capacity (R., p. 88). It was error (R., p. 87) to permit the cross-examination of the defendant (R., pp. 60-64) relative to certain communications (R., pp. 62-64) addressed by him to the Attorney General of the United States for the purpose of securing the discharge of the plaintiff from his office; it was reversible error for the trial court to permit the defendant to be contradicted and impeached by the witness Kroll (R., pp. 65-67, 68-70, 71-72); the testimony of a defendant to explain to the jury

the meaning he intended to convey by the words used in an alleged libelous article is *essential* to determine whether the meaning ascribed to it by the innuendo is correct (R., pp. 92-93); and it was error (R., p. 95) for the trial court to overrule the motion in arrest (R., pp. 9-10).

The Court of Appeals decides the case as one of slander and not of libel, and determines it exclusively by the rule which is applicable only to a case of slander.

The Court of Appeals expressly conceded (R., pp. 88, 91) that certain supposedly essential and omitted averments not appearing in the inducement or colloquium do appear in the innuendo, and, therefore, because of this presumed misplacing of words, or defect of form, the declaration is fatally defective (R., p. 92).

The judgment of the Court of Appeals (R., pp. 95-96), entered March 6, 1911, reversed the judgment of the trial court with costs, and remanded the cause to that court "with directions to arrest the judgment." To the end that any question as to the finality of the judgment of the Court of Appeals might be concluded without any further proceedings, expense, or delay, so that this cause might be speedily reviewed by this court, the plaintiff, without prejudice to any of his rights in the premises, insisting on the sufficiency of his declaration and the record herein, and electing to stand there upon, moved (R., p. 96) the Court of Appeals to amend its judgment by adding thereto a direction to the trial court to enter a judgment that the plaintiff take nothing by his writ, and that the defendant go thereof without day, but this motion was denied (R., p. 97). Thereupon the plaintiff filed his petition for a writ of error (R., pp. 97-98), and also his assignment of errors (R., pp. 98-100). The writ of error was allowed (R., pp. 100-101), the bond (R., pp. 101-102) was duly approved and filed June 1, 1911, and citation (R., p. 102) went the

same day. Thereafter the transcript of record was duly made up and filed in this court June 13, 1911 (R., pp. 102-103), and is No. 41.

The mandate of the Court of Appeals was issued to the trial court and was lodged in the latter court May 22, 1911 (R., pp. 85-86). Thereupon, May 22, 1911, the trial court entered its judgment (R., p. 86) on the mandate, reversing with costs its judgment of April 2, 1909, and arresting judgment in this cause. To this judgment for costs and in arrest, the plaintiff excepted in open court, and elected to stand upon his declaration and the record herein (R., p. 86). Thereupon the trial court entered its further judgment (R., pp. 86-87) that the plaintiff take nothing by his writ, and that the defendant go thereof without day with his costs of suit to be fixed by the clerk and recover of the plaintiff, and thereof have execution. From this judgment the plaintiff, in open court, noted an appeal (R., p. 87), which was thereafter duly perfected (R., p. 87), and the record was then made up and lodged in the Court of Appeals (R., pp. 87-88). In the latter court the printing of the record was dispensed with, and the cause was submitted to the court on the transcript of record, and the court entered its judgment (R., p. 88), affirming the judgment of the trial court entered on the mandate.

Thereupon the plaintiff filed his petition for a writ of error (R., pp. 88-89), the writ was allowed (R., pp. 88-90), the bond was approved and filed (R., p. 90), citation was issued and served (R., pp. 90-91), and the transcript of record was thereupon made up and lodged in this court June 13, 1911, and is No. 42.

To avoid duplication in printing, a stipulation (R., p. 92) has been filed, and the records on the two writs of error have been printed in accordance therewith.

II.

Specification of Errors.

The plaintiff specifies errors of the court below as follows:

1. The court erred in holding that the "declaration must be held to be fatally defective" and that it wholly fails to state a cause of action.

2. The court erred in holding that the instant declaration in libel must be tested by its sufficiency as a declaration in slander for the same words if spoken.

3. The court erred in holding that the declaration is bad in substance, because "the defamatory meaning must be set out in the inducement, and this meaning or application must appear by proper averment in the colloquium," and not elsewhere in the declaration than in the inducement and colloquium.

4. The court erred in holding that if the particular meaning ascribed to the libel by the innuendo is not fully borne out by the publication itself, the action can not be maintained even though the article is otherwise libelous.

5. The court erred in holding that the writing declared on is not libelous or actionable on its face.

6. The court erred in holding that the libel declared on is not actionable, because "the words are not actionable in themselves."

7. The court erred in holding that the libel declared on is not actionable unless the same words if spoken are actionable as slander.

8. The court erred in holding that the instant libel, which the defendant composed and caused to be printed and published in a newspaper of large circulation, "maliciously, contriving to injure plaintiff in his good name, fame, and credit, and to bring scorn, public scandal, infamy, and disgrace upon him, and to injure him in his office as United States Attorney," is not actionable, because "the

words spoken" will not "subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment," and "measured by this test, the words used in the publication are not in themselves actionable."

9. The court erred in holding that the libel declared on is not actionable in itself, because "the words spoken" do not make "a charge [which], if true will subject the [plaintiff] to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment * * *. Measured by this test, the words used in the publication are not in themselves actionable."

10. The court erred in holding that the granting of the plaintiff's first instruction to the jury was erroneous.

11. The court erred in holding that the granting of the plaintiff's second instruction to the jury was erroneous.

12. The court erred in holding that the judgment on the verdict should be arrested.

13. The court erred in holding that the writing declared on "amounts to nothing more than a permissible criticism of the conduct of plaintiff in his official capacity."

14. The court erred in affirming the judgment of the Supreme Court of the District of Columbia in No. 42, and in reversing the judgment in No. 41.

15. The court erred in holding that the cross-examination of the defendant relative to certain communications addressed by him to the Attorney General of the United States for the purpose of securing the discharge of the plaintiff from his office, was erroneous.

16. The court erred in holding inadmissible the testimony of the witness Kroll, the ruling of the court in this respect being as follows:

> "In the course of the trial, defendant testified, among other things, that the article in fact was in-

tended as a criticism upon plaintiff's going into the State of Maryland to engage in politics in violation of the civil service regulations of the United States. On cross-examination, for the purpose of showing malice, he was interrogated in respect of certain communications addressed by him to the Attorney General of the United States, for the purpose of securing, if possible, the discharge of plaintiff from his office. Defendant was also asked, over objection of his counsel, whether he had not sought the aid of one Kroll, a civil service employee of the Government, to assist him in his campaign for Congress, which he positively denied. Kroll was offered as a witness in rebuttal to contradict the above denial of defendant. He was permitted, over objection, to testify that defendant had sought his aid in conducting his campaign.

"In any view of the case, the admission of this evidence was reversible error. It related to a collateral transaction, and introduced, through the cross-examination of defendant, an issue not directly involved in the case. Nothing that defendant had testified to justified reference to this incident on cross-examination. The test of its admissibility in the way in which it was offered is, whether or not plaintiff would have been entitled to prove as part of his case in chief that defendant had attempted to employ Kroll. The application of this test clearly suggests the error. That the evidence was highly prejudicial to defendant is apparent, in that his integrity was thus impeached, and the jury improperly permitted to consider it in reaching the verdict."

17. The court erred in other respects apparent of record.

Points and Authorities.

The questions for consideration in this case are those, and those only, which are presented by the plaintiff's assignment of errors, since the defendant has sued no writ of

error, and can therefore be heard only in support of the judgment below. *Bolles v. Outing Co.*, 172 U. S., 262, 268; *Landram v. Jordan*, 203 U. S., 56, 62; and see *Fitchie v. Brown*, 211 U. S., 321; *Southern Pine Lumber Co. v. Ward*, 208 U. S., 126; and *Green Co. v. Thomas' Executor*, 211 U. S., 598, 601-602.

It is not deemed necessary to discuss separately the specification of errors, and the errors assigned may well be considered in this brief under four heads, comprising what the Court of Appeals held the trial court erred in respect of, and what we here contend the Court of Appeals erred regarding. It is submitted that the Court of Appeals was in error in holding, first: that plaintiff's declaration is fatally defective, and that the judgment must be arrested; second: that the testimony of the witness Kroll was erroneously received at the trial; third: that the trial court erred in granting plaintiff's first requested instruction; and fourth: that the trial court erred in granting plaintiff's second requested instruction.

FIRST:

THE COURT OF APPEALS ERRED IN HOLDING PLAINTIFF'S DECLARATION FATALLY DEFECTIVE, AND DIRECTING THE ARRESTING OF JUDGMENT ON VERDICT FOR PLAINTIFF.

The court below pitches its decision against the plaintiff upon the ground that his declaration is fatally defective because certain allegations said to be essential appear in the innuendo, whereas they should appear in the inducement.

It was expressly conceded by court and counsel below that the matter said to be vitally essential in the inducement was actually averred in the innuendo. This con-

cession reduces the defendant's objections to one of misplacement and not of omission, and hence to one of form and not of substance. Therefore it legally and logically follows that the objection was cured by the verdict. To this last conclusion further attention will be hereinafter given.

The defendant's objections to the declaration are sought to be presented in two ways, namely, (1) by motion to direct a verdict (Record, 72), and (2) by motion in arrest (Record 9-10), the latter motion expressly referring to the former for a statement "of the fatal defects apparent on the face of the declaration," and then repeating the substance of the former.

Let us first establish the concession above mentioned: In the motion to direct (Record 72), the defendant stated at length his objections to the declaration; these were that neither the inducement (averment) nor the colloquium alleged certain matters recited by the defendant, which he claimed were essential to warrant the meaning which the plaintiff attributed to the libel; and the defendant's statement of these objections because of the omission of such matters from the inducement and colloquium concludes in these words (Record 72):

> "all of which averments, though essential to be contained in the inducement or colloquium *were left entirely to the innuendo*, * * *."

This concession, as we have said, is carried into the motion in arrest (Record 9-10) in that the first ground thereof is this: "Because of fatal defects apparent on the face of the declaration stated to the court in the course of the trial." The only point in the course of the trial at which the defendant stated to the court "the fatal defects apparent on the face of the declaration" was when he made

his motion to direct; and therefore the statements contained in that motion are necessarily those referred to in the motion in arrest.

In the defendant's brief below the same concession is repeatedly made in express terms. On page 4 of that brief, after stating the same objections to the declaration that appear in the motion to direct and the motion in arrest, the defendant adds:

> "All these averments, without which, or some of them, no cause of action is stated, *are left exclusively to the innuendo.*"

On page 35 of his brief below the defendant thus states his objections to the declaration:

> "The grounds of the motion to direct a verdict for the defendant and of the motion in arrest of judgment are set out at pages 72 and 10 of the Record. These grounds are, in brief, that the *inducement* and *colloquium*, which are the only parts of the declaration which can be looked to for that purpose, contain no allegations upon which a verdict or judgment in favor of appellee can be recovered or sustained."

The defendant goes on to say that the innuendo is explanatory, only, of the words to which it is attached; that it cannot enlarge or restrict the natural meaning of those words; that it cannot introduce new matter, or make certain that which is uncertain, *except in so far as it connects the words published with the extrinsic or explanatory circumstances alleged in the inducement;* that it raises, in no case, questions of fact, but only of logic; and that it presents the inquiry, only, whether the explanation it gives is a legitimate conclusion from the term set out in the inducement and colloquium, the determination of which inquiry is, in all cases, the exclusive province of the court.

On page 36 of his brief below the defendant repeats his same objections to the declaration in other words, and then adds:

> "as to all of which matters the inducement and colloquium are wholly silent, *leaving them to be found in the innuendo only.*"

Again on page 39 of that brief, after quoting from the syllabus of *Van Tassell v. Capron*, 1 Denio 250, 252, that "Where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct by him in that character," the defendant adds this statement:

> "Nothing of the sort is to be found in the declaration in the present case *outside of the innuendo*, which, under all the authorities, cannot be looked to for the purpose of aiding or eking out the statement of the cause of action."

The defendant then proceeds to cite many cases in support of the rule that words not actionable *ex vic termini* must be charged by proper averment and colloquium warranting the meaning given them by the innuendo.

At page 44 of his brief below the defendant admitted that his objection to the declaration might have been obviated by amendment, the admission being thus stated:

> "The objection now under consideration was raised by motion at the trial, when under the rules of the trial court, it might have been obviated by amendment, without continuance; but the appellee elected to stand upon his declaration without curing it."

If the defendant's objections to the declaration were of such character that they could be cured by amendment, and no judgment against the defendant could be supported without proof and finding of the omitted matter, then it follows of necessity that the asserted defects were cured by the verdict.

By his admission that the declaration could have been cured by amendment, the defendant concedes at least that the declaration defectively stated a good cause of action.

Passing now to the opinion of the Court of Appeals we also find it conceded by that court that the matters which it held to be essential to the declaration were alleged in the innuendo, whereas they should have been alleged in the inducement, and for this reason the court held the declaration fatally defective. After stating (Record 87) that the chief ground of attack by counsel for defendant related to the action of the trial court in denying the motion in arrest, and that the defendant alleged in that motion that the judgment should be arrested (Record 88) for the reason that in neither the inducement nor the colloquium of the declaration was it alleged that the words complained of referred to the unlawful obtaining of money by the plaintiff in his official capacity from the race-track or its gamblers for the purpose of conducting a campaign against the defendant, or for any other purpose, in consideration of which the plaintiff agreed to refrain, or did refrain, from prosecuting the gamblers, or from performing any of his official duties, the court added (Record 88):

> "Nowhere in the declaration does the above allegation appear, *except indirectly in the innuendo.*"

Again, the court below (Record 90) speaks of "the futility of the pleader's attempt to embrace the necessary averment in the innuendo;" and again the court says

(Record 91) that "it will be found that nothing is contained in the declaration, *except in the innuendo*, to indicate even remotely that the words published had reference to the failure of plaintiff to prosecute the race track or its gamblers, or to his illegally or corruptly obtaining money from them in consideration of the non-performance of his official duties. This is not alleged in the publication itself, and must appear by proper averment in the declaration. Since it does not so appear, the declaration must be held to be fatally defective."

Having now conclusively established the concession of the court and counsel below that the instant declaration actually contains within its four corners the very matters which are claimed to be essential to the statement of a good cause of action, we repeat that the defendant's objections go merely to form and not to substance, that they are based exclusively upon the notion that such matters must be alleged in the inducement, and the inducement only, else the declaration is fatally defective. The objections are merely that such matters are misplaced, and not that they are omitted. By yielding to the defendant's contention the court below utterly sacrificed the merits of a good case to formal objections of a highly artificial and technical character. It is certainly against the policy of this court, as shown by its numerous decisions, to sacrifice substance to form. Conceding, as it must be and has been conceded, that the declaration contains within its four corners all the facts that are necessary to the statement of a good cause of action based upon the instant libel, we think that the defects pointed out by the court and counsel below, assuming for the moment that such defects actually existed, were cured by the verdict. Strangely enough, neither the court nor counsel below seems to have given any thought or consideration or

weight to the effect of the verdict in behalf of the plaintiff.

In *Tuttle v. Bishop*, 30 Conn., 80, there occurred the very condition of which the defendant in the present case has complained, that is to say, essential matter was averred in the innuendo which should have been alleged in the inducement; yet the court held the defect cured by verdict, using the following language:

> "Where words themselves do not necessarily import a charge of crime, yet where the declaration avers *in the innuendo* that the defendant willfully and maliciously spoke the words, they will be taken, *after verdict*, to have intended to import such charge."

In *Aloon v. Bass*, 17 Indiana App., 502, the court said:

> "Where a complaint is not attacked until after verdict, the court will support the complaint by every legal intendment, if there is nothing material on the record to prevent it; and where a fact must necessarily have been proven at the trial to justify the verdict, and the complaint omits it, *the defect is cured by verdict*, if the general terms of the complaint are otherwise sufficient to comprehend the proof."

In *Nestle v. Van Slyck*, 2 Hill, 282, the court said that "If it appear with reasonable certainty, on looking at the whole count, that the words were spoken of the plaintiff, *that must be enough after verdict*, although the averment is not made in the most skillful manner."

The court below has well stated the effect of the verdict to cure such defects as are claimed to exist in the present declaration, in the case of *Schwartz v. Reesch*, 2 App. D. C., 440, decided in 1894 by a unanimous court, the learned Chief Justice Alvey writing, in which the court used the following language (446-447):

"Upon motion in arrest of judgment the plaintiff is entitled to every intendment of law that can be reasonably made in support of the verdict. Everything that the defendant could object will be presumed to have been made and urged at the trial, and it must be intended that they were overruled. *Merrick v. Bank of Metropolis*, 8 Gill., 59, 75. Or, as stated by Sergeant Williams, in his note to the case of *Stennel v. Hogg*, 1 Wms. Saund., 228, 'that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict, by the common law; or, in the phrase often used upon the occasion, such defect is not *any ieofail* after verdict.' And he cites many cases, and gives a great number of illustrations, in support of the principle stated."

The case just cited was a hearing on an appeal by the defendant from an order of the Supreme Court of the District of Columbia, holding a law term, overruling a motion in arrest of judgment in an action of assumpsit. The defendant claimed that the plaintiff's replication to the defendant's third plea was defective because it did not specifically aver that the plaintiff's husband had gone beyond the jurisdiction of this District. The plaintiff insisted that the averments of his replication were equivalent in substance to such an allegation, and that this alleged omission was cured by the verdict. The court said (440) that as to the allegation that the husband had wilfully deserted and abandoned the plaintiff, "it must, *after verdict*, be intended that the husband had deserted the wife,

and abandoned and renounced this jurisdiction." The court concludes its opinion as follows (447):

> "We are of opinion that, upon the application of this principle of intendment, the verdict is sustainable upon the pleadings in the cause, and therefore the motion in arrest was properly overruled and the judgment must, consequently, be affirmed."

In passing it may be added that if defendant's objections to the declaration were material, it is not to be presumed either that the trial judge would have permitted the jury to give, or that the jury would have given, the verdict which was given, unless the issue joined was such as necessarily required on the trial proof of the facts which the defendant claimed were defectively and imperfectly stated or omitted, and it may be further added that it is not to be presumed either that the trial judge would have permitted the jury to give, or that the jury would have given, the verdict which was given, unless the proof showed that the libel declared on actually meant, and that the defendant intended it to mean, what the innuendo sets forth as its real meaning.

Washington & Georgetown Railway Co. v. Hickey, 5 App. D. C., 430, and *Chandler v. Norwood*, 11 App. D. C., 357, are also illustrative cases, in each of which the court below held that certain defects in the declaration were cured by the verdict.

In the case at bar the court below expressly admitted (Record, 95) that the alleged defect in the declaration "was called to the attention of the plaintiff, by motion in the court below, when he could have *amended* without delay, but he elected to stand upon his declaration. It was again presented by motion in arrest of judgment, but he still refused to avail himself of his rights." Surely, if the

alleged defect could have been cured by amendment, either before or after the verdict, it must have been cured by that verdict in this cause, for it was impossible for the verdict to have been rendered without proof and finding of the facts for the mere misplacement of which the court below held the declaration fatally defective. Of course, the admission by court and counsel below that the alleged defects of the declaration could have been cured by amendment is conclusive to the effect that the publication declared on was reasonably capable of the libelous meaning attributed to it by plaintiff in his innuendo.

Section 954 of the Revised Statutes of the United States provides as follows:

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

At the time the instant declaration was filed, namely, March 31, 1908, Section 3 of Common Law Rule 28 of the Supreme Court of the District of Columbia provided as follows:

> "In all cases of defects in pleadings which were the subject of special demurrer at common law, the defect may be taken advantage of by motion to strike out."

By revision taking effect October 1, 1909, this rule appears as Section 3 of Common Law Rule 31 of the trial court, being amended to read as follows:

> "Defects in pleadings which were the subject of special demurrer at common law, may be taken advantage of by motion to strike out, or other appropriate motion."

The practical effect of the rules just quoted has been to abolish entirely the use of special demurrers in common law causes in the Supreme Court of the District of Columbia, and a motion to strike is always used in lieu of a special demurrer. A defect of form, such as is mentioned in Revised Statutes, Section 954, quoted *supra*, is taken advantage of by motion to strike, and not by special demurrer.

Section 954 of the Revised Statutes is elaborately annotated in 4 Fed. Stats. Ann., 590-601, and in 2 Supp. 1912 Fed. Stats. Ann., 1443-1445; and from these annotations it clearly appears that the alleged defects in the present declaration do not warrant the arrest of the judgment of the trial court.

In *Canadian Pacific R. R. Co. v. Elliott*, 137 Fed., 904 (C. C. A., 1905), the court held that where no objection was made to the declaration until the close of the evidence, and everything that the defendant claimed should have been alleged was proved, and the jury found the facts in favor of the plaintiff, a judgment on the verdict would not be set aside for defects in the declaration. That is exact-

ly the situation presented by the present record, for no objection whatever was made to the declaration until the close of the evidence, everything that the defendant claimed should have been alleged in the inducement was proved, and the jury found the facts in favor of the plaintiff. Indeed, the instant case is stronger than that just cited, because it is conceded that the matters which the defendant contended should have been alleged in the inducement were actually averred in the innuendo. See also *Chicago R. R. Co. v. Voelker*, 129 Fed., 522 (C. C. A., 1904).

In *Stockton v. Bishop*, 4 How., 155, decided in 1846, the court held that where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect; that in an action on the case for injury sustained by the over-setting of a stage-coach, although the declaration does not set out the payment of any passage money, nor the promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger for certain rewards to the defendants, and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed, and if the breach was well assigned, and the cause went on to plea, issue, trial, and verdict, the defect in the declaration was cured by the 32d section of the Judiciary Act of 1789; and that the right of the cause and matter in law being with the plaintiff in the court below, the judgment of that court must be affirmed. The court said (167) that "no demurrer was interposed for want of form; and this brings the 32d section of the Judiciary Act of 1789 to bear on the proceeding. Not guilty was pleaded; a trial had on the issue, on which the jury returned a verdict * * *." The court further said (168):

"The declaration, plea, and finding must be taken together; and from these, we are bound, by the 32d section, above cited, to ascertain whether, according to the 'right of the cause and matter in law' the plaintiff is entitled to her damages; and in so doing, defects of form must be disregarded. Why Congress so provided, in 1789, is obvious. No modes of proceeding were prescribed by the act, in civil causes, at common law, and the modes observed in the English courts left to apply as general rules. These were formal and technical; and forasmuch as by the 35th section all parties to causes in courts of the United States might plead and manage their own causes personally, if they saw proper, technicalities could not be required. That the practice under this privilege has not corresponded to the theory tolerating it may be conceded, yet we cannot for this reason disregard the clause covering *jeofails*, intended for its protection; and if proceedings, as recorded, in the courts in any part of the Union were as loose in 1789 as this record indicates them yet to be, in one circuit at least, where the two acts of 1789 continue to govern, it must be admitted that Congress acted wisely in declaring that no litigant party should lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that to save the party's rights the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance.

"According to 'the right of the cause and matter of law' appearing to us on the pleadings and verdict, we think the plaintiff is entitled to her damages, and that judgment below ought to have been rendered for her."

Libel is an infamous crime by the law in force in the District of Columbia. Section 814 of of the Code of Law for the District of Columbia provides that whoever publishes a libel shall be punished by a fine not exceeding one

usand dollars, or imprisonment for a term not exceed-
five years, or both. If the substance of the instant
laration had been embodied in an indictment against
defendant, it is not conceived that a judgment of guilty
con would have been affected by reason of the alleged
cts or imperfections set up by the defendant. This is
ially so because Section 1025 of the Revised Statutes
he United States provides as follows:

"No indictment found and presented by a grand
jury in any district, or circuit, or other court of the
United States shall be deemed insufficient, nor shall
the trial, judgment, or other proceeding thereof be
affected by reason of any defect or imperfection in
the matter of form only, which shall not tend to the
prejudice of the defendant."

his section is elaborately annoted in 2 Fed. Stats. Ann.,
343, and in 2 Supp. 1912 Fed. Stats. Ann., 953-954;
from these annotations we think it is not open to ques-
that if the alleged defects of this declaration had ap-
d in an indictment for libel, the judgment thereon
l not have been affected by such defects. It is at
fair to conclude that the civil pleading should not be
d by any stricter rule than the criminal pleading.
ce the court below, as said by this court in *Taylor v.*
itzer, 220 U. S., 90, 92, yielded a consideration of
erits of the case to what, in the circumstances, was
more than form, this court will feel less hesitation
otherwise it might in acting upon its own opinion that
ourt below took too strict a view of the declaration.
tstanding this court is generally slow to overrule
cisions of courts other than courts of the United
upon matters of local practice.
at we have hereinbefore stated effectively disposes

we think, of the attack made on the instant declaration; but as we may be mistaken in our view, we do not feel at liberty to drop the subject at this point, and shall therefore consider other phases of it.

The Motion to Direct.

As we have said, the defendant attempted to present his objections to the declaration by his motion (Record, 72) to direct a verdict for the defendant. This motion was based exclusively upon the alleged defects in the declaration. The statement is axiomatic that such a motion touches only the evidence in the case as a demurrer thereto, and does not touch any defects of pleading, and it is therefore useless to attempt to assert the contrary. *Court v. Birbeck*, Doug. Rep., 208; *Bank v. Smith*, 11 Wheat., 172; *Van Stone v. Stillwell*, 142 U. S., 134; and see *McAfee v. Huidekoper*, 9 App. D. C., 39, and *Ubhoff v. Brandenberg*, 26 App. D. C., 3.

The Motion in Arrest.

By his motion in arrest (Record, 9-10), the defendant attempted to present the same objections to the declaration which he made the sole basis of his motion to direct. When the defendants motions for new trial and in arrest came on for hearing, the record shows (Record, 11) that the defendant by his attorney "states in open court that he does not desire to argue said motions; whereupon, it is ordered, that said motions be, and the same are hereby, overruled, and that judgment on the verdict be entered." Thereupon judgment on the verdict was entered, and "from the foregoing, the defendant, by his attorney in open court, notes an appeal to the Court of Appeals."

Thus the record expressly shows that the defendant

waived or abandoned his motion in arrest, and consented to the entry of a judgment from which he appealed, and which the court below reversed in No. 41. We say this because the court below has so ruled a similar record upon the authority of a prior decision of this court. The defendant's objections to the declaration of course were not properly presented to the trial court by the motion to direct, and could not be considered on that motion, yet when the motion in arrest was filed, embodying the same objections recited in the motion to direct, the defendant, instead of relying upon his motion in arrest, and under it properly presenting his objections to the trial court, waived or abandoned it, and consented to the entry of the judgment from which he appealed.

Gauss v. Goldenberg, 39 App. D. C. 507, decided by a unanimous court October 17, 1912, was before the court on a motion to dismiss an appeal in a landlord and tenant case. The landlord filed his affidavit of merit, and the tenant answered by an affidavit of defense, whereupon the landlord moved for judgment on the ground of the insufficiency of the latter affidavit. The record disclosed that when the motion was called for hearing, counsel for the plaintiff stated he was ready to proceed, and counsel for the defendant (508) "*stated he did not desire to argue the motion,*" and that the court could pass upon the said motion without the reading of the pleadings or argument, and render judgment for the plaintiff, from which judgment the defendant desired to note an appeal to the Court of Appeals; the trial justice stated that he was unwilling to decide cases in that manner, from which an appeal would be taken, unless the defendant assented thereto; "the defendant's counsel thereupon stated he did not wish to appear to assent or consent," but that the defendant had no objection to the court entering such judgment; and the

court accordingly rendered judgment for the plaintiff, "from which an appeal was noted, supercedeas bond offered in open court, and approved by the justice, without objection by the plaintiff" (509). The motion to dismiss was based upon the ground that the tenant consented to the entering of the judgment against him. The tenant contended that the judgment was entered at his suggestion merely for the purpose of placing himself in a position to present the case to the Court of Appeals for its decision, and therefore did not estop him from urging that error was committed in entering it. In sustaining the motion to dismiss, the court said (509):

> "Here, the judgment was entered, at the suggestion of counsel for appellant, without argument, and without even a reading of the pleadings by the court. The question of the sufficiency of the affidavit of defense was, therefore, not properly presented to the court below, and hence cannot be raised for the first time on appeal. This court cannot be substituted for a trial court. In the case of *United States v. Babbitt*, 104 U. S., 767, the Government consented to a judgment being entered against it in the Court of Claims, for the purpose of presenting the question raised to the Supreme Court for its decision. Speaking on this question, the court said: 'When a decree was rendered by consent, no errors would be considered here on appeal, which were in law waived by such a consent. In our opinion this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of.'"

In the case at bar the judgment was entered at the necessarily implied suggestion of the counsel for the defendant, "without argument, and without even a reading of the pleadings by the court." The question of the sufficiency of the motion in arrest was therefore "not prop-

erly presented to the court below, and hence cannot be raised for the first time on appeal." The appellate court "cannot be substituted for the trial court." In *Ganss v. Goldenberg*, the court concludes as follows (509):

> "Appellant, by consenting to the entry of the judgment below, is estopped from contesting it on appeal. The motion is granted, and the appeal dismissed with costs."

On the face of the instant record it appears that the defendant waived the errors complained of in his motion in arrest. He expressly declined to argue his motion in arrest, and did not even read it to the trial court. The question of the sufficiency of that motion was not properly, or at all presented to the trial court, and hence could not be raised for the first time on appeal, since the appellate court cannot be constituted for the trial court, as has already been stated. A rule of the Court of Appeals expressly provides that "In no case will this court decide *any point* or question that was not fairly presented for decision by the court below," and this principle was declared in *Eaton v. Brown*, 20 App. D. C., 453, 459, and in *Norman v. United States*, 20 App. D. C., 494, 497; and in the latter case the court said (497):

> "The law is well settled, and the rule on the subject is peremptory, that questions not raised in the trial court will not be considered in the appellate tribunal."

The firmness with which this court applies the same principle is always recognized by lawyers. If the points which we have just made are sound, then it follows that the motion in arrest is out of the case, and that the de-

fendant could not maintain his appeal from the judgment of the trial court, and hence a reversal of the judgment of the Court of Appeals must follow.

The Declaration Analyzed.

Assuming (1) that the motion to direct reaches the alleged defects of the declaration, (2) that these alleged defects were not cured by the verdict, (3) that the motion in arrest is in full effect, and (4) that the defendant's appeal from the judgment of the trial court can be maintained, we now come to the proposition that the alleged defects are untenable, and that the declaration as drawn is good. In approaching this subject we first observe that when the instant declaration was filed Common Law Rule 23 of the trial court provided as follows:

> "The declaration shall state only the substantive facts necessary to constitute the cause of action, without unnecessary verbiage, and with substantial certainty."

The office of a declaration in libel is to inform the defendant what is imputed to him, what injury he is said to have inflicted, and how he is said to have inflicted it; or, as stated in *Newell on Slander and Libel*, 613, "The defendant is entitled to be informed by the declaration what is imputed to him, what injury he is said to have inflicted, and how he is said to have inflicted it." The question of the sufficiency of the instant declaration is therefore to be measured by a proper consideration of the office of the declaration, and the provisions of the rule of the trial court imperatively requiring that the declaration shall state only the substantive facts necessary to constitute the cause of action, without unnecessary verbiage, and with

substantial certainty. Apart from a critical analysis of the present declaration, it is very difficult to conceive that the defendant was not sufficiently and fully informed of the plaintiff's charge against him. Speaking apart from the face of the declaration itself, it is a matter of practical import that the evidence in this record shows so conclusively that the defendant was so very fully aware of the plaintiff's case against him that any objection based upon lack of such information is specious in the extreme. If any effect is to be given to the rule of the trial court which controlled the form of this declaration, then it can hardly be said that it is fatally defective because it omits formal matters and unnecessary verbiage, and states only the substantive facts necessary to constitute the cause of action, with substantial certainty.

A technically accurate and complete declaration in libel drawn according to the highest art of the special pleader at common law, embodies the following parts: (1) caption; (2) commencement; (3) body (inducement, or averments of extrinsic facts); (4) colloquium; (5) innuendo; and (6) conclusion. The body contains the allegations of the plaintiff's good character and occupation, of the defendant's malice, and the averments of such extrinsic facts as may be proper to show the surrounding circumstances in which the libel was published. The colloquium contains the averment that the libel was published of and applied to the plaintiff, in connection with the facts alleged in the inducement. The office of the innuendo is to explain the defendant's meaning by the language published, in the circumstances stated.

There is a broad distinction between libel and slander which the court below wholly repudiates, and this distinction is necessarily of great importance in testing the present declaration. Libel is any written matter, or any

picture, image, symbol, or other thing, suggesting an idea through the sense of sight, which tends to make some person infamous, odious, ridiculous, contemptible, or censurable, or to bring him into public hatred, contempt, ridicule, or disrepute, or otherwise to annoy, degrade, or disgrace him, or to impair his reputation. It is a censorious or ridiculous writing, picture, or sign, made with a mischievous and malicious attempt toward Government, magistrates, or individuals. Scandalous matter is not necessary to make a libel, but it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible or ridiculous. Such matter published in writing or print is actionable without proof of special damage.

Slander, on the other hand, is not actionable unless it can be shown to have caused the plaintiff some actual damage, except in these three cases, (a) where it falsely imputes to the plaintiff the commission of some criminal offense involving moral turpitude, and punishable by the criminal law, or (b) where it falsely suggests that the plaintiff is affected with some contagious or loathsome disease which would tend to exclude him from society, or (c) where it falsely imputes to the plaintiff want of integrity, want of mental, moral, or technical capacity, or some other unfitness, incompetency, or dereliction in respect of some office that he holds, or of his profession or trade. In these excepted cases slander is actionable without proof of any actual damage resulting therefrom to the plaintiff.

The broad distinction between libel and slander is sharply pointed out in *White v. Nicholls*, 3 How. (loc. cit.), 285-286, and still more sharply in *Culmer v. Canby*, 101 Fed., 195, 197, decided May 8, 1900, by the Circuit Court of Appeals for the Sixth Circuit, composed of Circuit

Judges Lurton and Day, and District Judge Clark, and the same distinction runs throughout all of the authorities. Apart from the instant case and one other, this distinction between libel and slander has been fully recognized and enforced in every other case decided by the court below. See, for examples, *Chalmers v. Washington Post Co.*, 36 App. D. C. 231, 233; *Bailey v. Holland*, 7 App. D. C. 184; *Washington Gas Light Co. v. Lansden*, 9 App. D. C. 508; *Steamboat Co. v. Davis*, 12 App. D. C. 306; *Times Co. v. Downey*, 26 App. D. C. 258; and *Raymond v. United States*, 25 App. D. C. 555. These are not all of the cases in the court below which can be cited to this distinction. In *Colmer v. Canby*, *supra*, Circuit Judge Day, writing for the unanimous court, says (197 U.):

> "In the late case of *Insurance Company v. Bladen*, decided in this court on November 13, 1899, 30 C. C. A. 19, 58 Fed. 222, we had occasion to point out the difference between verbal slander and written defamation, and need not herein repeat the discussion. The authorities there cited, and many others, establish the proposition that *there is a broad distinction between the two classes of actions for spoken and written or published words*, and that the latter are actionable when they impute to another any act, the tendency of which is to disgrace him, or to deprive him of the confidence or good will of society, or lessen its esteem for him." In the case of *Peermaker v. Dibble*, 12 C. C. A. 300, 64 Fed. 686, the rule is thus stated:
>
> "'In the first count, if the words are in their usual and ordinary sense, as they should be understood by a person reading them, tend to injure or degrade the plaintiff morally or socially, then they are actionable per se. It is not essential that the words should impute dishonesty

> or immorality of any special character. If they tend to degrade or dishonor him or injure his character, or hold him up to scorn, contempt, or ridicule, or render him of less esteem in the community, morally or socially, then the words are actionable when printed. Of course, the rule is different in slander, or mere spoken words, where it is necessary that some offense known to the law should be imputed.'"

The court below tested the instant declaration by the rules in slander and not in libel, and even in slander repudiated two of the three fixed rules of exception, although the two repudiated are of as much importance and as firmly established as the one recognized.

Brooker v. Coffin, 5 Johns., 188, decided by the Supreme Court of Judicature in November, 1909, was an action of slander based upon the following words: "She is a common prostitute, and I can prove it. She was hired to swear the child on me. She has had a child before this when she went to Canada. She would come damn'd nigh going to State prison." The declaration was based upon the theory that these words charged the plaintiff with an infamous crime, but the court ruled the contrary, and in so holding laid down as the rule applicable to that case the language quoted by the court below as controlling the instant declaration in libel.

The court below also quotes and follows *McCuen v. Ludlum*, 17 N. J. L., 12, a case of *slander* decided by the Supreme Court of Judicature in 1839. The words spoken were these: "He has broken open my letters in the Post-Office." The declaration was framed upon the theory that these words charged a crime under the postal law, but, in ruling the contrary, the court, immediately preceding the language of the opinion quoted by the court below, said that

> "If there had been a colloquium of and concerning the malconduct of the plaintiff in the execution of his office, or of and concerning his unlawful breaking open the defendant's letters, then before the words spoken by the defendant might by a proper innuendo be made to appear to the people to mean that the plaintiff had unlawfully broken open the letters."

In each of the two counts of the present declaration the colloquium (Record, 3, 7) is "of and concerning the said plaintiff, and of and concerning the said office of the said plaintiff."

The next case quoted and strongly relied upon by the court below is *Rex v. Horne*, 2 Cowp. 672, decided by the Court of King's Bench, November 19, 1777. The case was a prosecution for *criminal libel*. Horne caused to be published in two newspapers an article which stated that at a special meeting of the Constitutional Society at the King's Arms Tavern, Cornhill, June 7, 1775, some of the members agreed to subscribe to a fund of one hundred pounds to be given to Dr. Franklin, for the purpose of helping the surviving members of the families of those who had been inhumanly murdered by the King's troops at Lexington and Concord. Horne also published at London, on a later date, an article which stated that he had given Dr. Franklin for the above purpose the sum of fifty pounds. The trial took place before the Earl of Mansfield, and a special jury, and resulted in a verdict of guilty. The defendant filed a motion in arrest of judgment, alleging that the information was insufficient in that it did not aver that there had been any rebellion in the colony of Massachusetts Bay, or that certain persons, who were denominated the King's troops, had been employed by the King and his Government to quell the rebellion, and the defendant argued that if by any possible construction or intendment

the expression could receive an innocent sense, the consequence was that no crime was sufficiently alleged, that troops might mean flocks, or companies of deserters, and that the words of the article might therefore have been used innocently. The judgment for the King was affirmed. The court said that the question was whether the writing contained in the information was in point of law sufficiently charged to be a libel upon his Majesty's Government, and in deciding this question the court said that it was not necessary to consider whether this libel came within a description of a libel which constituted a crime of itself, without any assistance of other circumstances, or what the judges' opinions upon that question might be, because they were all of opinion that there was sufficient matter expressed with sufficient certainty to constitute a crime. The court further said that the words, "of and concerning his Majesty's Government, and the employment of his troops," amounted to a sufficient averment to put the allegation of a crime legally upon the record. The court also considered whether the sense of the writing must be understood to be a libel on the Government. The libel charged that innocent subjects had been inhumanly murdered by the King's troops only for preferring death to slavery. The court further said (page 688):

> "The motive imputed tends to aggravate the inhumanity of the act, and, consequently, of the imputation itself, because it arraigns the Government of a breach of public truth, in employing the means of the defense of the subjects in the destruction of the lives of those who are faithful and innocent.
>
> "As to any other circumstances not stated in the information, if those which are stated do of themselves constitute an offense, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient

essential to the constitution of the crime, and therefore not necessary to be averred by the record.

"Upon the whole of the case, therefore, we are unanimously of the opinion that the record contains all facts and circumstances necessary to warrant the conclusion to the jury, and that it likewise contains all facts and circumstances necessary for the information of the court to give their judgment upon an action."

It is a little difficult to see how the case just quoted tends to support the ruling of the court below that the instant declaration is fatally defective on account of the objections thereto urged by the defendant.

The well-known *slander* case of *Pollard v. Lyon*, 91 U. S., 225, is also quoted by the court below. The facts and rulings in that case are exceedingly well known in this District.

The last case quoted by the court below in support of its ruling that the present declaration is fatally defective because certain matters said to be essential in the inducement appeared in the innuendo, is *Carter v. Andrews*, 16 Pick., 1, a well-known case of *slander*.

It is worthy of note that the court below did not quote or rely upon a single case of civil libel in support of its opinion construing the present declaration in libel as fatally defective. The court therefore decided this case as one of slander and not of libel, and held this delcaration in libel fatally defective because it did not measure up to a particular one of the three established rules of exceptions in slander, although it does fully measure up to another one of those three rules. By some strange inadvertence, both the opinion of the court below and the defendant's brief in that court are wholly silent as to the extremely well-known and leading libel case of *White v. Nicholls*, 3 How., 266, a case quite celebrated in this District, where it arose.

We find it impossible to reconcile the ruling of the court below in the present case with the law as laid down in *White v. Nicholls, supra*, and ever since followed.

The first and second counts of the instant declaration allege the following facts:

(1) Plaintiff was United States Attorney for the District of Columbia.

(2) It was plaintiff's duty as United States Attorney to present to the Grand Jury and prosecute before the courts of said District all persons charged with the violation of any laws of the District of Columbia against crimes and misdemeanors.

(3) The Washington Jockey Club, a body corporate, owned a race track in the District and was at, before, and after the time of the publication, conducting horse races thereon; that at said race track divers persons bet upon the result of the races; that if such betting on the races constituted a violation of any of the laws in force in the District of Columbia, it was the duty of the plaintiff, as United States Attorney, to present the person so betting to the Grand Jury for indictment; that on January 25, 1908, the plaintiff, as United States Attorney, did present to the Grand Jury for indictment, one John Walters, and that said Grand Jury returned an indictment against him, charging a violation of the statute prohibiting the setting up of gaming tables; that Walters demurred to the indictment and that the Associate Justice of the Supreme Court of the District presiding in the criminal branch of the court, sustained the demurrer, holding that the laying of bets, or making of wagers, at said race track was not in violation of any law in force in the District; that plaintiff, as United States Attorney, prosecuted an appeal from such decision and that said appeal was pending at the time of the publication complained of; that plaintiff, pending said appeal,

considered the decision of said the Justice of the Supreme Court of the District to be the law of this District, hence had not ordered the issuance of warrants for the arrest of or presented to the Grand Jury of said District any persons charged with betting at said race track.

(4) That the defendant was a candidate for nomination by the Republican party for the office of Representative in the Congress of the United States from the Sixth Congressional District of the State of Maryland, and to further his interests in that regard had caused to be published a number of articles, as paid advertisements, in the Washington Herald, a morning newspaper published in this District by the Washington Herald Company.

(5) That the Washington Herald Company not only published the paper known as the Washington Herald, but also circulated the same in the District of Columbia and throughout the United States of America and in foreign countries.

(6) That said plaintiff always performed his duties as United States Attorney for the District of Columbia in an honest, upright and dignified manner.

(7) That the defendant, "maliciously, wickedly and fraudulently contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney for the District of Columbia aforesaid, did, heretofore, to wit, on the 28th day of March, A. D. 1908, compose, publish and cause and procure to be composed and published, of and concerning the said plaintiff, and of and concerning the said office of the said plaintiff in the said newspaper called 'The Washington Herald' of date, to wit, March 28, 1908, the same being published in the City of Washington, District of Columbia, and widely circulated among the people of the

whole United States and in the countries aforesaid, and particularly in the said City of Washington, District of Columbia, a certain false, scandalous, malicious and defamatory libel * * *."

Then follows the libelous article which, stripped of innuendoes, reads:

"WARNER'S POLITICAL CONTEST.

"Colonel Pearre said in his great onslaught on Mr. Warner a few days ago:

"'I regard his candidacy as a joke. If I had a monkey and a hand organ, I could get up a crowd anywhere.'

"This was a fine expression for a statesman, but not wanting in dignity so much as a Justice of the Supreme Court of the District of Columbia, who, with the United States District Attorney, went to Rockville last Saturday to attend a conference of Mr. Warner's enemies and determine what ammunition was needed to defeat him.

"The question now is, where does the money come from in the contest against Mr. Warner?

"How about the race track?

"LAWYER."

The first count of the declaration then continues (R., p. 4):

"Which said false, scandalous, malicious and defamatory libel was composed and published and caused and procured to be composed and published as aforesaid by the said defendant, of and concerning the said plaintiff, said defendant meaning and intending thereby to charge that the said plaintiff was a corrupt, dishonest and unworthy person, and was being influenced in the discharge of his duties as United States At-

torney for the District of Columbia by the fact that some person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling permitted thereon, was contributing money to be used against the candidacy of the said defendant, Brainerd H. Warner, for the office of Representative in the Congress of the United States as aforesaid, by means of which said false and scandalous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation, and brought into scorn, scandal, infamy and disgrace insomuch as divers good and lawful citizens have, by reason of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievance, from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as the United States Attorney for the District of Columbia aforesaid * * *."

The second count of the declaration then continues (R., p. 8):

"Meaning thereby and intending to convey, and actually conveying that the said plaintiff, in the performance of his duties as United States Attorney for the District of Columbia as aforesaid, has acted and is acting corruptly, and was and is being influenced in the discharge of his duties as United States Attorney for the District of Columbia, by reason of the fact that some person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling permitted or carried on thereon, was contributing money to be used against the candidacy of the said defendant for the office of Representative in the Con-

> gress of the United States as aforesaid, by means of which said false and scandalous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation, and brought into scorn, scandal, infamy and disgrace in so much as divers good and lawful citizens have, by reason of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievance, from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as the United States Attorney for the District of Columbia aforesaid * * *."

From the foregoing analysis of the instant declaration it appears to contain all of the essential elements of a declaration in libel properly drawn under the rules of special pleading. Without descending into a more critical analysis of the facts alleged in the inducement, we feel justified in saying that they fully support the meaning attributed to the libel by the innuendoes in each count. It is impossible to escape the contention that by this libel the defendant intended to charge that the plaintiff had been guilty of official misconduct in his office as United States attorney for the District of Columbia, or of a conspiracy to do or refrain from doing acts amounting to such official misconduct. It has been expressly decided that such misconduct is an infamous crime in the District of Columbia. *Tyner v. United States*, 23 App. D. C., *loc. cit.* 358-360; Code D. C., Sec. 910. It is familiar law that a conspiracy to commit an offense against the United States is also an infamous crime.

The article declared on, as against the motion in arrest, may be considered as a libel on the plaintiff in any one or more of three capacities, namely, (1) as a private per-

son, (2) in his profession as an attorney at law, and (3) in his public office as United States attorney. There is quite enough in this declaration to sustain it as a libel by the plaintiff in some one or more of these capacities, under the most strict reading of the decided cases.

The motion in arrest is simply a *postponed demurrer*, that is, a demurrer interposed after the fact instead of during the pleadings, and seeking to take advantage of errors appearing on the face of the declaration. Perry on Pleading, 188, 212. A motion in arrest will not lie for formal objections; formerly this was otherwise, and judgments were constantly arrested for errors of this character, but this practice has long since been removed by the statutes of amendments and jeofails, by the effect of which a judgment at the present day can not generally be set aside for any defect in form. Perry on Pleading, 211.

Treating the motion in arrest as a postponed demurrer, we invoke the rule that a demurrer to a declaration in libel admits the allegations in so far as it puts the actionable quality of the words used in the publication, and it admits the character of falsity, publication, and malice, and the correctness of the innuendoes alleged, unless they attribute a meaning to the words that is not justified by the language itself, or by extrinsic facts with which they are connected. Cabaniss v. Washington Post Co., 38 App. D. C. 231, 233.

Any question of privilege or qualifiable criticism is left out of the case by the admission of the truth of the charges of malice, falsity, and want of probable cause. In the recent libel case of *Nalle v. Oyster*, 230 U. S. —, decided June 16, 1913, this court, in reversing the Court of Appeals of the District of Columbia, used the following language:

"Counsel for plaintiff in error rest upon the authority of the decision of this court in *White v. Nicholls*, 3 How., 266, 291, 11 L. ed., 591, 602, where, after a full review of the English and American authorities, the court declared that, in the ordinary case, malice is to be implied from the mere publication of a libel, and justification, excuse, or extenuation, if any, must proceed from the defendant; that with respect to privileged communications the recognized obligation or motive that may fairly be presumed to have led to the publication, and so to relieve it from the implication of malice, so far changes the rule of evidence as to require the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct; that such malice may be proved although alleged to have existed in the proceedings before a court, and although such court may have been the proper authority for redressing the grievance presented to it; that proof of express malice in a pleading filed in any such proceeding will render the pleading libelous and actionable; and that 'in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause amount to proof of malice.'

"The defendants, having demurred to the count in question, necessarily admit the truth of the facts stated in it, so far as they are well pleaded. Among the facts so pleaded are malice, falsehood, and the want of probable cause; and the averment of these facts is not negatived or qualified by anything else that appears in the count. The count does not even show that the alleged libelous matter was pertinent or material to the issue, for it does not show the nature of the proceeding, nor what was the issue, nor that the plaintiff was a party to it.

"It is unnecessary to say that the issue joined upon the demurrer to the first count is legally distinct and separate from the issue joined upon the demurrers to the pleas to the other count. Nothing in the second count or in the subsequent pleadings can be imported into the first count. And so, while we may surmise

> that the legal proceeding referred to in the first count is the same as that elsewhere referred to in the pleadings, we cannot base upon this surmise a judgment upon the demurrer. So far as appears from the count itself, the plaintiff may have been a stranger to the proceeding in which the alleged libelous answer was filed. Moreover, there is nothing to rebut the averment of falsehood and the absence of probable cause. And since it cannot be doubted that the matter is libelous unless protected by the privilege, it follows that the court erred in sustaining the demurrer."

The libel in the *Nalle* case reflected upon the plaintiff in her occupation or profession as a teacher in the local public schools, as will be readily recalled.

The defendant, by his motion in arrest, having in legal effect demurred to both of the counts of the present declaration, and there being nothing in either count which can be imported into the other, and as the defendant thus necessarily admits the truth of the facts stated in both counts, so far as they are well pleaded, and as among the facts so pleaded are malice, falsity, the want of probable cause, and a meaning fully justified by the extrinsic facts with which the innuendoes are connected, and as the averment of these facts is not negatived or qualified by anything else that appears in either count, and there is nothing to rebut the averment of falsity and the absence of probable cause, and the other facts alleged, and since it cannot be doubted that the matter is libelous, unless protected by privilege, and since no privilege is pleaded or otherwise shown, it follows that the court below erred in sustaining the motion in arrest.

The court below also holds (R., p. 88) that because the article, in its opinion, is as susceptible of interpretation as a permissible criticism of the plaintiff as of the inference that he was corruptly refraining from prosecuting the race-

track gamblers, in consideration of their furnishing the money with which to conduct the campaign against the defendant, therefore the declaration must be held fatally defective.

The true rule is that a demurrer—and a motion in arrest is only a postponed demurrer—"can only be sustained where the court can affirmatively say that the words are incapable of any reasonable construction which will render them defamatory." [illegible]

The case just cited presented a single question, namely, the correctness of the ruling of the trial court sustaining a general demurrer to a petition undertaking to recover for an alleged libel. The petition set forth an article published by defendant charging the plaintiff with making fraudulent representations in the sale of [illegible], for which the defendant had commenced an action [illegible], and also with carrying away certain [illegible] the defendant, and using the [illegible] an article against the [illegible]. The court held that the petition presented a view of the law as to its application and [illegible] proper instructions as to what constitutes a libelous publication, and was not therefore subject to demurrer on the ground that the petition did not state a cause of action. The libel is set forth in full at page 196, and, while it is too long to be repeated in this brief, we invite attention to it simply to show that the instant publication is at least as libelous as that was. The case, as has been said, was unanimously decided by Circuit Judges Lurton and Day, and District Judge Clark, Circuit Judge Day writing; and as the opinion bears so closely upon the objections most seriously urged against the plaintiff in the present case, we shall quote it quite freely. The court said (196-198):

"It is unnecessary to determine whether the innuendoes undertaking to set forth the meaning of a part of the publication are justified by the terms of the publication itself. An innuendo can neither enlarge nor restrict the meaning of words beyond their ordinary or usual signification, and upon general demurrer the question is not whether the alleged libel will bear the meaning attributed to it in the innuendoes, but whether the publication, giving to the language its ordinary and usual meaning, is actionable without averment of special damage. The fact that an innuendo attributes a meaning to words which they will not bear is no ground for sustaining a demurrer to the declaration on the ground that it does not constitute a cause of action. The innuendo may be treated as surplusage, and yet the publication be defamatory. *Newell, Defam.*, p. 225; *Klaus v. Sentinel Co.*, 60 Wis., 425, 19 N. W., 384. Before a demurrer can be sustained to a petition counting on an alleged libelous publication, it must appear that the publication is not reasonably capable of a defamatory meaning, and cannot reasonably be understood in a defamatory sense. If an inspection of the publication convinces the court that no such reasonable construction of the language used could give to it a defamatory sense and meaning, a demurrer should be sustained; otherwise, its meaning and interpretation must be left to the jury, under proper instructions as to what constitutes libel. *Yssombly v. Monroe*, 136 Mass., 464. In *Sanderson v. Caldwell*, 45 N. Y., 398, it is said:

> "'If the application or meaning of the words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine, under all the circumstances, whether they were applied to the plaintiff, and in what sense they were used.'

"We think this is the true rule, and applicable to the present case. See, also, *State v. Smith*, 37 Ohio St. 34. In the latter case it is said:

> "'The objection that the innuendo averring the meaning of the language relating to the search was not justified by the language used is not well founded. Where the meaning of the defendant, by the language employed, is equivocal or doubtful, the question whether the publication is libelous or not is one for the jury. So, too, whether the meaning of the defendant, by the language used, was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact, and not of law.'

"In the late case of *Insurance Co. v. Buckner*, decided in this court on November 13, 1899, 39 C. C. A. 19, 98 Fed. 222, we had occasion to point out the difference between verbal slander and written defamation, and need not herein repeat the discussion. The authorities there cited, and many others, establish the proposition that there is a broad distinction between the two classes of actions for spoken or written and published words, and that the latter are actionable 'when they impute to another any act, the tendency of which is to disgrace him or to deprive him of the confidence and good will of society, or lessen its esteem for him.' In the case of *Pfitzinger v. Dubs*, 12 C. C. A. 309, 64 Fed. 696, the rule is thus stated:

> "'In the first count, if the words, taken in their usual and ordinary sense, as they should be understood by persons reading them, tend to injure or degrade the plaintiff morally or socially, then they are actionable *per se*. It is not essential that the words should imnate dishonesty or immorality of any special kind or character. If they tend to degrade or dishonor him or injure his character,

or hold him up to scorn, contempt, or ridicule, or render him of less esteem in the community, morally or socially, then the words are actionable when printed. Of course, the rule is different in slander or mere spoken words, where it is necessary that some offense known to the law should be imputed."

"Accepting these settled rules of decision, and remembering that a demurrer can only be sustained where the court can affirmatively say that the words are incapable of any reasonable construction which will render them defamatory, we are of opinion that the alleged publication in this case, when properly pleaded, is not open to general demurrer, but its application and meaning should be left to the jury, under proper instructions as to what constitutes a libelous publication. We do not think it proper, in view of this conclusion, to undertake to analyze or comment upon the construction and meaning of the alleged libel in this case. In this view of the case, we think the learned judge who heard the demurrer in the court below erred in sustaining the same, and the judgment will be reversed, and the cause remanded to the Circuit Court for further proceedings in accordance with this opinion."

In the libel case of *Erwin v. Record Publishing Co.*, 97 Pac. 21, decided by the Supreme Court of California in 1908, the article charged as libelous was to the effect that Mabel Erwin, Queen Mab, had at some prior time interviewed Ah Wing, a Chinese pugilist, and had made the biggest hit of her life; that on returning to town that morning he had wired her to meet him at the station at 7 a.m., but the hour was evidently too early, as Queen Mab did not put in an appearance; that Ah Wing was very much disappointed, as he had dolled himself out in his Sunday suit; that he came sadly into the *Record* office to find her; that

there are some things which are better left unsaid, so it is best to pass over the meeting between the Queen and her humble servant; and that some things are too sacred for mere words. The innuendo imputed to the words meaning that the plaintiff was a person of low character, sweetheart and boon companion of a Chinese prize-fighter, and possessed of a low and base character, without shame and self-respect. A demurrer to the declaration was filed and overruled. The court said:

> "The only error urged upon this appeal is that the court erred in overruling a demurrer to the [illegible] assigning as a ground that the complaint did not allege facts sufficient to constitute a cause of action. This objection is not well taken. It is [illegible] to decide whether or not the article [illegible] but the best that can be said of it is that [illegible] it is equivocal and capable of a meaning [illegible] the plaintiff of the character stated in the [illegible] It might readily be understood by any one reading it as implying that the plaintiff was a member of the underworld, familiar with the Chinese criminal class and upon such terms of intimacy with [illegible] they met, things took place between them that [illegible] not fit for publication, implying that they were of indecent or improper character. Being capable of this meaning, it was proper for the plaintiff to have a jury say whether or not [illegible] which it was intended by the defendant [illegible] stood by its readers, or, more properly speaking, understood, there can be no question that the [illegible] was libelous."

We have already shown that the Court of Appeals expressly admits in its opinion that the [illegible] capable of an innocent meaning, but [illegible] capable of an improper meaning, that is to say, a proper criticism on the act of a public official, and therefore the court concluding that as the article in question is susceptible

capable of an innocent as of a guilty meaning, the latter meaning must be repudiated and the former accepted as a matter of law. [illegible] Court of Appeals, as shown by the authorities which we have cited, is directly the reverse of the true rule governing the situation presented. This phase of the case is quite apart from the other feature which led the court below to hold the declaration fatally defective because certain matters were alleged in the manner in which the court held it unnecessarily necessary to allege in the inducement.

The innuendo does not [illegible] explanatory to add to the reasonable meaning [illegible] the libel when read in connection with the [illegible] set out in the inducement and colloquium, and must certainly not if alleged matter alleged in the [illegible] taken into consideration. The defendant cannot shield himself from the consequences of his act and intent by using dark words, or attempting to disguise his real meaning, or by resorting to interrogation or sarcasm. The [illegible] meant exactly what the proof showed and the jury found he intended to mean, that is to say, that the plaintiff was corrupt and guilty of official misconduct with respect to the race-track. No man is at liberty to [illegible] the character of his fellowman, and then defend on the ground that it is possible to torture an innocent meaning from his language. The defendant in such posture cannot expect a court to delegate its function of administering justice, and reduce itself below the level of the intelligence of the common reader who naturally and most correctly understood and comprehend the exact meaning which the defendant by his publication intended to inflict on the plaintiff. So far, then, as [illegible] is concerned, we think that it is [illegible] sufficient, or that in any event, for reasons hereinbefore stated, the conclusion of the court below, holding it fatally defective, was wrong.

SECOND:

THE COURT OF APPEALS ERRED IN HOLDING THAT IT WAS ERROR FOR THE TRIAL COURT TO ADMIT THE TESTIMONY OF THE WITNESS WILLIAM A. KROLL (R., pp. 68-70).

In the trial court the defendant testified at length with respect to his intent in composing and publishing the article sued upon. His intent was directly and distinctly put in issue. And the burden of his testimony was that he published the libelous article because he was at the time of its publication, had been for years prior thereto, and continued to be down to the date of the trial of this cause, opposed to active participation in political matters by any person holding an official position under the Government, and more particularly was he outraged at the very thought of the active participation in politics of any person employed in the classified civil service of the Government. The Record discloses that the defendant, as a witness in his own behalf, practically delivered a lecture on purity in the civil service (R., pp. 57, 60, 61, 64-65). He took the witness stand fortified by copies of civil service rules and regulations, instructions respecting political activity of civil service employes issued by President Cleveland, a letter of President Roosevelt on the same subject, an order of the Attorney General issued in 1901, as to the spirit of the civil service law regarding active part in political conventions by federal officers and employes, and circular instructions issued by the civil service commission (R., pp. 60-61). He solemnly testified that he published the article of March 28, 1908, to criticize the action of the District Attorney, looked upon by the defendant as a civil service employe of the Government, in going into a political meeting, in violation of what defendant interpreted to be the

spirit of civil service rules and regulations; he had no other intent!

If anything was in issue in this case, it was the defendant's intent at the time he published the libel. And if his intent was in issue, as it so distinctly was, and if it was competent for the defendant to testify what his intent was, as he in fact did testify, and as the Court of Appeals has held to be competent, then was it not competent for the plaintiff to give in evidence acts of the defendant which negatived the existence of any such intent as that which he claimed on the witness stand he had?

Both on his direct examination and on his cross-examination, the defendant *said* that at the time of the publication he had in mind a certain intent, borne of his deep-rooted objection to active participation in politics by any civil service Government employe. After he had so testified, defendant was on cross-examination interrogated regarding a civil service employe named Kroll; he testified that he knew that Kroll was a classified civil service employe of the Government (R., p. 60); he was asked, in substance, if he had not in December, 1907, and again in January, 1908, in writing requested this civil service employe to come to his (defendant's) office, and if he had not there solicited Kroll to assist defendant in his campaign for Congress, and had not promised to see that Kroll would be protected so far as the civil service rules were concerned. The defendant admitted the sending of communications to Kroll, requesting the latter to visit his office, and admitted conversations with Kroll, but denounced as absolutely untrue the suggestion that he, himself, had solicited this civil service employe's active assistance in the political campaign in which defendant was engaged (R., p. 60). Thereupon, the defendant having closed his case, the plaintiff in rebuttal called to the witness stand the said Kroll, who tes-

tified, in substance, that he had visited the defendant's office, at the latter's request, and had been solicited by the defendant to actively work on his behalf in the congressional campaign. The defendant objected to this testimony on the ground that it related to a collateral matter, developed by the cross-examination of the defendant when he was on the witness stand. After argument, the learned trial court overruled the objection, stating (R., p. 69):

> "The question to my mind is whether it is a collateral question, and I am inclined to think it is not. The gist of this whole controversy now is as to the intent of the defendant in this cause when he wrote this article. That being so, any evidence that reflects upon that intent is admissible evidence, because it goes directly to the point at issue. * * * One of the ways of judging whether an intent is honest or not is whether a man lives up to it. Intent is the question at issue, and if you can show that a man talks one way and acts another, then surely that is admissible evidence to pass upon the question of the accuracy of what he says, the truth of what he says. * * * the defendant has given his version of the transaction, the reason for it. The plaintiff in the case challenges those reasons, and he seems to me to have the right to say to the jury 'these are the reasons stated. We give you acts which we think are inconsistent with those statements. It is for you to pass upon the truth of the intent.' I think it is admissible."

It will thus be seen that after the defendant had testified at length respecting his intent in publishing the article complained of, and had stated that it was solely his intention to vindicate the spirit of the civil service rules, and to call attention to what he characterized as a violation of the spirit of those rules, and after he had been directly interrogated regarding his own solicitations of a

civil service employe named Kroll to actively assist him at the very time when he testified on the witness stand he was so unalterably opposed to participation in politics of such Government employes, as a result of which opposition he published the libel sued on, the plaintiff, having properly laid his foundation, in rebuttal showed by the witness Kroll that at that very time the defendant was soliciting the active participation in politics, in his own behalf, of this witness Kroll, who, as already stated, was a civil service employe and who was known by the defendant to be such.

Plaintiff caused defendant's words to evidence of his own acts, absolutely inconsistent with the state of mind he testified to. That was all there was to the Kroll incident. The trial court held the evidence admissible. The Court of Appeals held this action to be reversible error. (R., p. 87). We submit that the trial court was right, that the testimony was competent, and that the Court of Appeals erred in holding its admission to be error. No authority was cited by the defendant's brief in the Court of Appeals, or by the Court of Appeals in its opinion, to show the incompetency of this testimony.

Since the Court of Appeals' decision in the instant case, it has on this point rendered a decision contrary to its conclusion herein, in the case of *Thompson-Starrett Company v. Warren*, 38 App. D. C. 310, 316, decided February 5, 1912, where a somewhat similar question was presented.

At the risk of being guilty of unnecessary repetition, we again point out that at the trial the defendant said he published the article complained of by the plaintiff because he objected to a person employed in the civil service of the Government taking an active part in a district congressional campaign, and considered one so acting a proper subject of criticism. To test the honesty of this position,

he was asked if it were not a fact that in this same campaign, he, himself a candidate, had solicited the active aid in his behalf of a civil service employe named Kroll. He denied having done so. "If admitted, he would discredit himself; if denied, witnesses could be called to discredit him." *Thompson-Starrett Company v. Warren, supra.* If defendant had solicited Kroll's active participation in such a campaign, knowing that Kroll was a civil service employe of the Government, then that action was inconsistent with what he claimed to be his purpose in publishing the libel, and inconsistent with his statement respecting his intent made as a witness. If the jury believed Kroll's testimony, that afforded sufficient foundation for disbelieving absolutely the testimony of the defendant respecting his pretended intent in the publication complained of. His intent was not collateral: it was in issue: the defendant so claimed: the trial court so ruled; the Court of Appeals so holds; plaintiff simply produced testimony to negative the possibility of the existence of the intent which defendant claims he had. That testimony bore on the direct issue which the defendant injected into the case. It had no relation to anything collateral. Defendant having testified to his state of mind, plaintiff had a right to rebut that testimony by showing his acts from which could be inferred another state of mind, and in plaintiff's rebuttal testimony any fact was admissible that would go to show that at the time, or about the time, defendant did the act complained of in the declaration, he had not this high idea of civic righteousness and civil service purity that he exhibited on the witness stand.

Stress is laid on the point that the question of defendant's solicitation of Kroll's assistance was brought out on cross-examination of the defendant. But this was simply following up what he had testified to about his intent in

endeavoring to vindicate civil service laws and regulations in his direct examination, and voluntarily and at length in his cross-examination. It is submitted that the decision of this court in *Scott v. United States*, 172 U. S., 343, 346-348 governs here. In that case *Scott* was indicted for stealing a letter and its contents from the mails. As a witness for himself at the trial, upon his direct examination, he testified that when he was arrested and the money found upon him, he said to the inspectors, "Somebody has done me a dirty trick;" that if the inspector was not concerned in that, "some enemy of mine in that office was." Upon cross-examination, the District Attorney asked "Have you any enemies among the employés of that station?" and the defendant answered that he had one by the name of Weisner, and another named Silsbee. When the defendant rested, the Government called as witnesses Silsbee and Weisner, the two men named by the defendant as his enemies, both of whom testified, under the objection and exception of defendant's counsel, that they had no ill-will whatever toward the defendant and that they had never had any quarrels with him and Weisner said, on the contrary, that he had liked the man. The counsel for the defendant objected to this testimony on the ground that the evidence of defendant upon this subject was collateral, brought out by the Government on his cross-examination, and that the Government was bound by his answers. The trial court having overruled the objection, the question was presented to this court whether that ruling was error. The court said *ibid.* 347-8:

> "Regarding the objections taken by the defendant to the evidence of Silsbee and Weisner, as to which we think they were properly overruled, the evidence objected to was not irrelevant, and the Government was not bound by the answers of the defendant

as to Silsbee and Weisner being his enemies. When arrested the defendant had upon his person the three bills and the fifty-cent piece which had been marked by the post office inspectors and placed in the letter and deposited in the letter box, address[ed] as stated. Appreciating his position, the defendant endeavored then and there to account for his possession of the money, and he accounted for it by saying that some one, some enemy of his at the office, had done him a dirty trick, by which, as he testified, he meant to say that some one had deposited that money in his coat pocket while his coat hung up in the sorting room, and while he was absent from that room. This evidence of defendant was an attempt to raise a suspicion, at least, that some enemy of his in the building had placed the money in his coat, and thereby to relieve himself from the suspicion of having stolen it and to show his own innocence. It was an attempt at an explanation showing an honest possession of the money. It was therefore admissible, upon cross-examination, for the purpose of showing the improbability of the explanation, to obtain from the witness all the circumstances which might throw light upon the subject. For that purpose he was asked if he had any enemies in the department, and he said that he had, naming two employes at the particular station, and the superintendent and the other a fellow letter carrier.

"If this were true it might have been argued to the jury that the explanation of defendant was strained, and the inference that one or both of those enemies had done this trick might [illegible] been maintained with more plausibility. To show that no such inference could properly be drawn, the Government proved that the men the defendant named as enemies were not such in fact. The evidence was not collateral to the main issue of guilt or innocence, nor was the subject first drawn out by the Government. The district attorney on the cross-examination only obtained the names of those upon whom the defendant attempted to cast suspicion by his statement as

chief. He could not escape from the possibility of being contradicted by the failure to name the enemies on his direct examination. That examination suggested an explanation which, if believed, showed an innocent possession, and however improbable it was, the Government had the right to pursue the subject and to show that it was unfounded. The objection to the evidence cannot therefore be sustained."

So in the instant case, defendant's testimony respecting his intent in publishing the article to criticize violation of the civil service regulations, to which he was opposed, made it admissible, upon cross-examination, for the purpose of showing the improbability of that explanation, to obtain from the witness all of the circumstances which might throw light upon the subject. For that purpose, he was asked if he had not himself, in the same campaign, sought the active aid of a civil service employe. If he had not done so, it might well have been argued to the jury that he in fact had in making the publication the intent which he testified he had. If he had done so, the inference was a fair one, that his testimony respecting his intent in publishing the libel was false. To show this, it was open to the plaintiff, after having properly laid a foundation therefor, to give evidence which tended to place before the jury the real views of the defendant on this matter of the civil service regulation. The evidence was not collateral to the main issue as to what the real intent of the defendant was, nor was this subject first drawn out by the plaintiff. It is submitted that the rule of *Scott v. United States, supra*, directly applies here. It does not meet the point here to quote authorities announcing the admitted and elementary doctrine that collateral matter brought out on cross-examination can not be contradicted.

That evidence of facts apparently collateral, showing the

animus of a party at a particular time, are admissible when that animus is material, has been established by authority. Thus, in the case of *Butler v. Watkins*, 13 Wall. 456, this court said:

> "It was an important inquiry in the case, what was the purpose or animus of the defendants in their negotiation with the plaintiff? Was it to mislead him by holding out false hopes of consummating an arrangement by which his cotton tie could be introduced into the market, and was this in order to secure the defendants themselves against competition? Deceit in effecting such a purpose lay at the basis of the action. But how can such a purpose be shown when it has not been avowed? Actual fraud is always attended by an intent to defraud, and *the intent* may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another at about the same time and in relation to a like subject, was actuated by the same spirit. If, therefore, it be true that in the spring or early summer of 1868, the defendant had similar negotiations with Wailey, respecting his cotton tie, and conducted towards him deceitfully in order to keep his tie out of the market that year, the fact tends to show that in their conduct towards the plaintiff, there was the same animus, and that they had the same object in view. That the evidence offered was admissible for that purpose is abundantly proved by the authorities."

> "It is well settled that to show the existence of knowledge, intent, or motive, or any bodily or mental state whatever in any case where the existence of such knowledge, intent or motive is a fact at issue or a fact

> relative to the issue, evidence is admissible of other acts unconnected with the act at issue where those acts show or tend to show knowledge, intent, motive or any bodily or mental state whatever." Newell, Slander and Libel, p. 815.

In *Eastman v. Preno*, 49 Vt. 355, which was an action of trover for a horse alleged to have been purchased by defendant with fraudulent intent of getting possession of it without paying therefor, the plaintiff offered evidence to show other transactions for the purpose of sustaining the fraudulent intent. The court said, at page 361:

> "Upon this view of the alleged purchase, the defendant's fraudulent intent is a material fact to be made out, and in such case, collateral transactions may be shown to establish such intent. 1 Greenleaf on Evidence, Par. 53."

This doctrine is sanctioned by this court, *Castle v. Bullard*, 23 How., 172. Mr. Justice Clifford, in that case, uses the following language in reference to the evidence offered, which was of the same import and for the same purpose as in the case at bar:

> "Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration."

Where there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion, may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind

or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue.

Stephens, Digest of Evidence, 56.
Ross v. State, 62 Md., 224.
Street v. State, 7 Tex. Ct. App., 5, 9.
Bottomly v. U. S., 1 Story, 135, 143.
Castle v. Bullard, 23 How., 172, 186.
Butler v. Watkins, 13 Wall., 456, 464.
Friend v. Hamill, 34 Md., 298, 306.
Com. v. Ferrigan, 44 Pa. St., 386.
French v. White, 5 Duer (N. Y.), 254.
Com. v. Coe, 115 Mass., 481.
People v. Marion, 29 Mich., 31.
Conf. People v. Corbin, 56 N. Y., 363.
Coleman v. People, 58 N. Y., 555.

From these authorities it appears that wherever the mind of a person at the time of the doing of a particular act is part of the issue or relevant to the issue, evidence of other acts showing or tending to show the state of that mind is admissible, and, of course, where evidence is offered by a party to show the state of his mind at the time of the doing of a particular act, any evidence that would show or tend to show an opposite state of mind is admissible and such evidence is in no instance objected to the issue involved.

It must be remembered that no exception was taken to the admission of testimony on cross-examination of defendant, respecting his solicitation of the active assistance of Kroll, a civil service employe in defendant's political campaign. When Kroll was placed on the witness stand for the purpose of showing that defendant's acts were inconsistent with the civil service views that he testified that he held when he libeled the plaintiff, which views defendant said alone actuated his publication, an objection was made to Kroll's testimony on the ground that it was on a collat-

lateral matter. The learned trial justice, after lengthy argument, correctly differentiated between collateral matter and the evidence offered, in the short opinion quoted above.

We submit that it is clear from the record in this case (1) that defendant put in issue the question of his alleged intent in publishing an article referring to plaintiff, and (2) plaintiff had a right to meet this issue by testimony of facts showing actions of the defendant at or about the same time, which were so inconsistent with the declared intent, and so contradicted the holding by him of his alleged civil service views, as to completely and directly rebut his testimony on the witness stand.

THIRD:

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT COMMITTED ERROR IN GRANTING PLAINTIFF'S FIRST REQUESTED INSTRUCTION (R. pp. 72-73).

The trial court at the request of plaintiff granted the following instructions to the jury:

> "1. If you find from the evidence that at the time of the publication of the article described in the declaration the following were facts, namely:
>
> (1) the plaintiff was United States Attorney for the District of Columbia;
>
> (2) there was in said District a race track at which were being had races of horses;
>
> (3) at that track betting or making wagers on the results of said races was being carried on;
>
> (4) it was believed or claimed by some that the said betting or laying of wagers or the permitting of the same, could be prevented by the prosecution in that behalf by the plaintiff as such District Attorney of the persons engaged in or permitting the said betting or laying of wagers;

(5) the plaintiff in fact did not prosecute the said persons or any of them;

(6) the defendant was engaged in a contest in the County of Montgomery, State of Maryland, for nomination as a candidate for the office of Representative in the Congress of the United States from the Congressional District embracing said County;

(7) his opponent in said contest for such nomination was the certain Pearre, in the said article mentioned;

(8) in the said contest the plaintiff supported the candidacy of the said Pearre and opposed that of the defendant; and

(9) the defendant wrote and procured the publication of the said article;

Then you were instructed, as matter of law, that the said article is libelous and that your verdict should be for the plaintiff, and that the only question for your determination is what amount of damages the plaintiff is entitled to recover of the defendant by reason of the publication of the said article."

The Court of Appeals held that the granting by the trial court of the above quoted instruction to the jury was error.

It is to be observed at the outset of the discussion under this head that the defendant did not note any exception in the trial court to the ruling that the publication complained of was libelous, in the event the jury found the extraneous fact, submitted to them by plaintiff's first instruction, to have existed at the time of the publication.

Defendant did not except to the ruling of the learned trial justice when he first announced that, under the facts proved and not disputed at the trial, the publication complained of imputed to the plaintiff that which his declaration alleged was imputed to him by it. (See Record, p. 49.)

Defendant did not except to the granting of plaintiff's first instruction on the ground that said instruction told the jury, in the event they found the existence of the facts therein submitted to them, that the publication was libelous; on the contrary, defendant placed his objection to the granting of this instruction on the specific ground that the court should not submit to the jury the question of the existence of the extraneous fact thereby submitted to them. (See Record, p. 73.) The statements made in defendant's objection to the granting of this instruction as to his being foreclosed in the submission of any evidence relevant to a complete defense is not borne out by the record; the testimony of the defendant himself covers pages 57 to 68 of the printed record, and an examination of that testimony, as well as of all of the testimony adduced by the defendant in his behalf, shows conclusively that every possible defense was set up and received in evidence at the trial.

Nowhere in the record was exception taken by the defendant at the trial to the court's ruling that, in the light of the proved and conceded facts, the publication was not susceptible of the interpretation contended for by defendant. Nowhere in the record will there be found any exception noted at the trial to the charge of the court that the article was libelous, provided the extraneous facts were found by the jury to have existed. It is submitted that the question whether it was erroneous for the trial court to grant plaintiff's first instruction could not avail the defendant in the Court of Appeals, unless it was error for the trial justice to refuse to instruct the jury as prayed in defendant's second requested instruction. (R., p. 75); this is but another way of saying that this question should not have availed the defendant in the Court of Appeals unless it was the duty of the trial justice to submit to the jury the question of placing on the defendant's publication an impossi-

ble and absurd construction, and in doing so to have granted and read to the jury a confusing and misleading instruction.

We shall discuss under the present head the action of the learned trial justice in granting plaintiff's first instruction, as if the granting of this instruction was not error; then it follows necessarily that the trial justice was right in rejecting the defendant's second and third requested instructions. It is proper to digress at this point to invite the court's attention to the fact that the trial court, at the request of defendant, granted and read to the jury the following, being defendant's fifth requested instruction (R., p. 76):

> "5. If the jury believe from the evidence that the true intent and meaning of the defendant in his reference to the race-track, contained in the article published in the Washington Herald of March 28, 1908, was to inquire what the complainant was doing or intended to do about the operations of the so-called bookmakers then in progress at the Bennings race-track, and to suggest or complain that the plaintiff's time and attention should be directed to the prosecution of the said bookmakers and to the suppression of their said operations, rather than to the part he was taking in the contest for the Republican nomination to Congress in Montgomery County, Maryland; that the said intended comment and criticism were fair and reasonable under the conditions then existing at the said race-track, and the operations of the bookmakers then being carried on there; and that the intent and meaning of the defendant in publishing the said article was not to charge or intimate that the plaintiff was obtaining or seeking to obtain money for the said contest against the defendant, from the said bookmakers or other persons connected with the said race-track, in consideration of the plaintiff's failure to prosecute them or to inter-

fere with their said operations; and shall further find that the defendant was not guilty of actual malice as hereinafter defined, in the instruction given by the court, the plaintiff is entitled to recover such sum, and such sum only, as the jury shall find from the evidence will be fair and just compensation to him for the damage sustained by him in consequence of the publication of the said article."

It is submitted that the foregoing granted instruction was far more favorable to defendant than his case warranted.

The ground of the objection to plaintiff's first instruction, as granted by the trial court, was that it submitted to the jury the question of finding the existence of extraneous facts which gave to the words complained of their libelous and vicious character. These facts were not only undisputed, not only conceded in the trial court, but every one of them was practically testified to by the defendant himself. In both of the courts below, counsel for the defendant argued that the extraneous facts and circumstances which give to a publication its libelous character must be submitted to the jury. This is exactly what plaintiff's first instruction did and, as stated, defendant objected to that instruction specifically because it did this.

It was argued by counsel for defendant in their brief in the Court of Appeals that the reference to the race-track in connection with the reference to the source of money being used in the campaign against defendant might well have referred to Representative Pearre or Justice Gould, who are mentioned in the publication, rather than to the plaintiff, the District Attorney. This argument fails utterly, in view of the fact that the testimony of the defendant himself, as fully set forth in the record, shows that, while on the witness stand he repeatedly testified that the "race-

track" reference was exclusively aimed at plaintiff. Turning to pages 57-58 of the record, we find that the defendant testified—

> "* * * that the air had been full of this race-track business for a long time past, defendant's attention had been called to it, he had, himself, endeavored to aid in breaking up the race-track and pool selling, that objections to it were coming from every class of the community, from mothers, fathers, teachers, preachers, *and it all centered*, whether justly or not, on the office of the United States District Attorney: * * *" (R., p. 57 bottom, 58 top).

Again, on page 67 of the Record, the defendant testified—

> "* * * that, in the publication of March 28th, he wanted to know where the money was coming from, whether from these Government employees or whether it was given through Mr. Pearre or through the plaintiff; that he expected anybody who read the article to answer it, if he dared to do so; that the public he had a right to expect an answer, and that the defendant had the expectation that either one of the parties mentioned dared not reply to it; that he expected the latter in the public press, would come forward and say where the money was coming from, whether Mr. Baker or anyone else; that he gave them the opportunity to answer it to the public * * * that when he printed the article 'How about the race track,' he expected to hear from the District Attorney in the papers in response to that advertisement."

Thus it will be seen that it was impossible that either trial court or jury might have found that the words complained of could refer to Representative Pearre or Judge Gould in the very teeth of the positive testimony of the defendant himself that when he published in the publication

about the race-track was aimed directly at, and intended to apply to the plaintiff in his office as District Attorney. Nowhere in the record will be found the slightest suggestion that this race-track reference could by any possibility apply to any one but the plaintiff in his office as District Attorney. It was conclusively shown by the evidence that the plaintiff as District Attorney was the only person mentioned in the alleged libel with respect to whom it could be or had been claimed there was any duty to perform in connection with gambling at the race-track.

By the first instruction granted at the request of the plaintiff, the court said to the jury, that if the extraneous facts pleaded and proved were found by the jury to exist, then, but only then, were they instructed to find that the publication complained of libeled the plaintiff. It is submitted that, these extraneous facts being found, there is no escape from the conclusion that the publication did libel the plaintiff. If these extraneous facts existed at the time of the publication (and the jury by its verdict found that they did), then, we respectfully submit, no reasonable conclusion could have been reached in the trial court but that the meaning conveyed to the ordinary reader in this community by the defendant's publication was that the plaintiff in his office as District Attorney was corruptly refraining from instituting prosecutions against betters and bookmakers operating at the Bennings race-track in the District of Columbia, not because he was conforming himself to the construction of the law as laid down in the unreversed opinion rendered in the *Hatfield* case, but by reason of the fact that the race-track was a source of the ammunition—that is to say, money,—being used in the congressional campaign on behalf of Representative Pearre to defeat the defendant. It is to be noted that there is no doubt about the meaning of the word "ammunition" in the defendant's publica-

tion, for the defendant, as a witness at the trial, expressly testified that this referred to "how much money and what other means were necessary to defeat the defendant" (R., p. 57).

The rule as repeatedly announced by this court is: If from the undisputed facts in evidence all reasonable and fair-minded men must draw the same conclusion, then the question at issue is one of law for the court, and not of fact for the jury, and it is the duty of the court to instruct the jury the conclusion which must be drawn. If, on the other hand, on the question at issue, from the facts in evidence, with all the fair inferences that may be drawn therefrom, reasonable men might fairly differ as to the conclusion to be arrived at, then the determination of the fact in issue is for the jury. Where the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict.

Patton v. T. & P. Railway, 179 U. S., 658.
Elliott v. Chicago, etc., R. R. Co., 150 U. S., 245.
Delaware, L. & W. R. R. Co. v. Converse, 139 U. S., 469.
Marande v. T. & P. R. R., 184 U. S., 173.
Bowditch v. Boston, 101 U. S., 16.
T. & P. R. R. v. Gentry, 163 U. S., 353.
Pleasants v. Fant, 22 Wall., 116.

And the rule is the same respecting directing a verdict in favor of plaintiff as it is respecting the directing of a verdict in favor of defendant. If the facts in favor of the plaintiff are clearly established, and are sufficient and undisputed, it is the duty of the court to charge the jury to find for the plaintiff.

Hutchins v. Langley, 27 App. D. C., 234.
Marshall v. Hubbard, 117 U. S., 415.
Orleans v. Platt, 99 U. S., 676.
Macon County v. Shores, 97 U. S., 272.
N. P. Railroad Company v. Commercial National Bank, 123 U. S., 727.
Anderson County v. Beal, 113 U. S., 227.

Though arising most frequently in negligence cases, the rule is the same in any class of case. *Hutchins v. Langley, supra.* As in the case at bar, the article of March 28, published by defendant, taken as a whole, and read in the light of the facts which were submitted to the jury and which the jury found to have existed, must have been understood by all ordinary minds to have conveyed the meaning attributed to it in plaintiff's declaration; it was the duty of the trial court to determine that question and to instruct the jury as the court did instruct the jury. Stated in many different ways, the rule can hardly be found more clearly announced than as laid down by Mr. Justice Lurton in the case of *Smith v. Commercial Publishing Company*, 149 Fed., 704 (C. C. A.):

> "So the whole item, including the display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as reasonably to bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable, and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including the extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed, or by whom it may be read."

It is to be remembered that the trial court submitted to the jury the question of finding or not finding the existence of the extraneous facts which were admitted in evidence, and which are set forth in the first instruction granted at the request of the plaintiff (R., pp. 72-73).

We have seen that the rule is that the question is for the court where reasonable and fair-minded men cannot differ respecting the conclusion to be drawn from the proved facts. Stated with specific reference to libel and slander cases, the rule is:

(1) Where the words complained of are not susceptible of the defamatory meaning attributed to them by the plaintiff, and this must be the view of all, it is the duty of the court to direct a verdict for the defendant; in such case, the question is one of law for the court.

(2) Where the words complained of are fairly capable of two meanings, one harmless and the other defamatory, it is a question for the jury in what sense the readers may have understood them; in such case, the question is one of fact for the jury.

(3) Where the words complained of either by themselves or in the light of surrounding circumstances shown by the evidence are reasonably and fairly capable of only one construction, and that one gives to them a libelous meaning, then it is the duty of the court to so instruct the jury. And in reaching a true conclusion as to what interpretation is to be placed upon the words complained of, the court, no less than the jury, is to read the publication in its entirety, construe every part thereof with reference to all of its parts, and with reference to the conceded conditions in the community where it was circulated, and to understand it as it would generally be understood by the rest of mankind.

"And the court will understand the words of the writing as they would generally be understood by the rest of mankind, or as we ourselves would understand them out of court; that is to say, according to their plain and ordinary import. These are familiar and well settled principles. * * * And it is not necessary to make a writing libelous that the imputations should be made in the form of positive assertion. It is equally so if they are expressed in the form of insinuation, provided the meaning is plain." *Adams v. Lazeson*, 17 Gratt (Va.), 250, 256.

"Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient sense, but in the sense which fairly belongs to them." Quoted by Odgers, page 67, from *Ld. Ellenborough*, 2 Camp., 463.

"The rule now is that the words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they were adapted to convey to those who heard or read them. Where words from their general import appear to have been taken to defame a party, the court ought not to be industrious in putting a construction upon them different from that they bear in their common acceptation and meaning." 25 *Cyc.*, 355.

"An actionable imputation may be as effectually made *by way of interrogation* as by an affirmative allegation." 25 *Cyc.*, 361.

"To maintain an action for libel, it is not necessary that the charge shall be direct and positive—the imputation may be inferred from an indirect communication, as where the defendant expresses suspicion, or institutes a comparison, or delivers the words as matter of hearsay, *or by way of inquiry, or in answer*,

> or exclamation, or uses the disjunctive or adjective words, or speaks ironically." *Waters v. Jones*, 3 Port. (Ala.), 442, 29 Amer. Dec., 261.

An examination of all the text writers and decided cases will show that the rule is settled that the question is to be submitted to the jury only where the words are *reasonably* susceptible of two constructions, the one an innocent, the other a libelous construction; that in interpreting the words complained of, the entire discourse or sentence in slander, the whole article in libel, must be considered. A word at the end may alter the whole meaning. Isolated passages should not and cannot be dwelt upon, but the publication must be judged of as a whole. *Odgers, Libel and Slander*, 97, 98. The sting of a libel may sometimes be contained in a word or sentence placed as a heading to it. So, too, a word added at the end may altogether vary the sense of the preceding passage. *Odgers*, 97-98.

> "The law does not dwell on isolated passages, but judges of the publication as a whole." *Newell, Slander and Libel*, 291.

In *Negley v. Farrow*, 60 Md., 158, the Court of Appeals very interestingly discusses the historical foundation for the rule in England of the Courts leaving in all cases to the jury the question of "libel or no libel," after defining the law of libel to the jury. It is pointed out that this practice grew out of the Fox Act (32 Geo. 3, Ch. 60). The court goes on to say:

> "This act is not in force in this state, and here the court has always decided whether the publication is in law a libel, leaving it to the jury to find the fact of publication, and such other facts as may be pertaining to the issue; and we see no good reason for changing the practice. In actions for slander, the question whether the words spoken are in themselves actionable is a question of law for the court; and for the same

reason when the slanderous words are published, if the publication be free from ambiguity, the question whether they are libelous is a question of law for the court."

A leading case, and one directly in point, is that of *Mattice v. Wilcox*, 147 N. Y., 624-626. This case was most carefully considered by the Court of Appeals of New York and the unanimous opinion of that court rendered by *Mr. Justice Peckham*. In the *Mattice* case, the libelous meaning was conveyed by insinuation, as it was in the case at bar. In the *Mattice* case a circular written by a citizen and tax-payer, and addressed to other citizens and tax-payers of the village where it was published, related to the public management of village affairs, and contained words respecting the plaintiff, *Mattice*, which he claimed were libelous. The plaintiff was an attorney at law and previous to the publication of the article complained of he had been, as an attorney, frequently employed by the trustees of the village to defend suits brought against the village to recover damages by reason of alleged negligence of the village authorities in caring for its streets. In some of these suits verdicts had been obtained against the village. The defendant's circular was headed: "How to make business good in Oneonta, New York." This circular contained ten separate paragraphs in which the writer referred to various matters of interest in connection with the management of the village. In only one of the paragraphs was the plaintiff referred to. This paragraph, in which the plaintiff was named, and which the court held to be libelous *per se*, was the second of the circular and read as follows:

"2. Make Burr Mattice attorney for the village so that every person who gets spanked on the ice will be able to obtain a judgment of from $1,000 to $10,000 against the village."

The above quotation shows *all* that there was contained in the circular relating to or reflecting upon Mattice. He sued the writer, claiming that the foregoing was libelous in that it reflected upon him as an attorney at law in negligence cases which, by accepting retainers to defend, he held himself out as capable of handling. On the part of the defense in that case, as on the part of the defense in the case at bar, the contention was that the words were susceptible of two meanings, and it was also there contended that the words did not refer to the plaintiff in his profession generally, but only as to specific matters.

At page 626, Vol. 147, New York Reports, we find the defendant's contentions as set forth by the court, and in them note the familiar ring brought to this bar by defendant in the instant case. We quote from the contention presented to the New York Court of Appeals by the counsel for Wilcox:

> "Whether the words set forth in the second paragraph of the circular referred to are libelous or not depended upon their construction and meaning, which were questions for the consideration and determination of the jury." But the trial court "instructed the jury that these words upon their face charged the plaintiff with professional incompetency and incapacity, and that the only question for them to determine upon this branch of the case was the question of damages."

So we see that there the contention and the decision were the same as the contention and the decision here. In the *Mattice* case the trial court even went further and told the jury that the above quoted paragraph "was undefended and unmitigated, and that some damages should be rendered for it, and that plaintiff was entitled to exemplary damages."

therefor." In support of the exception to this, Wilcox's counsel argued very much as Warner's counsel argues (p. 627):

> "If the defendant wrote the article complained of without any malicious intention to injure the plaintiff, then in as much as the article dealt with matters of wide public importance, affecting the interests of the defendant and other tax-payers, the defendant had the right to criticize the acts and conduct of the plaintiff, and that it was for the jury to determine whether or not he had in the article complained of gone beyond the limitations of proper criticism."

We submit that it would be hard to find in any case a precedent more on all-fours than is the case of *Mattice v. Wilcox* with the case at bar. Mr. Justice Peckham, at page 629, says:

> "In our judgment the trial court made no mistake in charging the jury that the words of the second paragraph upon their face are actionable, and that the only question for them to determine upon that branch was one of damages. The learned judge said that there was no ambiguity about the language; that the meaning which everybody reading would draw from it was the incompetency and incapacity of the plaintiff as an attorney to perform the duties of attorney to the village, and that it attacked the plaintiff in his professional capacity, and nothing remained for the jury but to assess damages. The counsel for defendant argues that this was error, for the reason that the language is, at least, capable of two different meanings, one of which is not actionable, and the question should have been left to the jury to say in which sense the language was used by the defendant. He says that it was a question for the jury whether the defendant intended to or did charge a lack of professional skill or ability generally, or only a lack of it

> in particular cases referred to * * * The complaint herein alleges no special damages and none was proven. If the words are capable of the construction contended for by the counsel for the defendant then, he says, that as no allegation was made and no proof given of any special damage, the question as to the sense to be given to the language was for the jury."

But the court rejected this claim, upheld the ruling that the paragraph was libelous *per se*, and affirmed the judgment for the plaintiff.

In *Hanchett vs. Chiotovich*, 101 Fed. 744 (C. C. A.) in a circular to their employes the defendants said, among other things, the following, which was the part complained of as libelous:

> "We respectfully request our employes to refrain from associating with him (plaintiff) either directly or indirectly, and suggest that no one of our agents, representatives, or employes, trade or deal with Chiotovich in any manner whatsoever."

In the Circuit Court of Appeals, Ross, J., said:

> "The court told the jury that this language was susceptible of two meanings—one harmless and the other defamatory—and left it to the jury to determine from the evidence in the case in which sense, within the meaning of the words, the persons to whom the notice was addressed, or persons who read the same, may have understood them; at the same time saying that the burden was on the plaintiff to show that the language was defamatory. *If there was error in this it was error in favor of the defendants.* 'Any words' says Odgers on Libel and Slander (p. 21) 'will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbor.' * * * The

publication in question is to be construed in its entirety. So construed there is in it, to say the least, a clear insinuation that the plaintiff was not a fit or proper person for employes of the defendant to associate with. * * * *

"In libel it is enough, whatever the form, that the manifest tendency of the words is seriously to hurt the plaintiff's reputation." *Haynes v. Clinton Printing Co.*, 160 Mass., 512, 513.

"The rule now is, that the words are to be taken in their plain and natural meaning, and to be understood by *courts* and *juries* as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard them." *Durant v. Clement*, 69 Vt. 297.

The following from *Freisinger v. Mowe*, 65 N. J. L. 288, is in point:

"Words spoken of a person in his office, business, or employment, imputing a want of integrity, of credit, or of common honesty, or charging personal incapacity, are actionable if without justification, and general damages may be recovered. * * *

"Regard must be had also to the rule that words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed."

"Where integrity and ability are essential to the due conduct of plaintiff's office, words impugning the ability and integrity of the plaintiff are clearly actionable * * * for they distinctly imply that he is unfit to continue therein." Odgers, Libel and Slander, pp. 65, 66.

"We take it to be an elementary rule that words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business." *Gottbehuet v. Hubachek*, 36 Wis., 517.

In the case of *Kilgour v. Evening Star Company*, 96 Md. 16, wherein a demurrer to plaintiff's declaration was sustained, which action was affirmed by the Maryland Court of Appeals, that court lays down the correct rule of law applicable as follows:

> "The rule of law applicable to cases of that kind seems to be clear. Words spoken of a person in his office, trade, profession, business or means of getting a livelihood, which tend to expose him to the danger of losing his office, or which charge him with fraud, indirect dealings" etc. "*are actionable without proof of special damage*, even though such words, if spoken or written of an ordinary person, might not be actionable *per se*. . . . It is not proper to separate words or phrases from the context. All parts of the paper should be read in connection, to collect their true meaning."

The argument for defendant here is that the court must and should separate the last line of the article complained of and as thus separated read and interpret it. It is contended that the words, "How about the race-track?" have no connection with or reference to the apparently vital query of the publication, to wit, "The question now is, Where does the money come from in the contest against Mr. Warner?" To agree with the defendant in his attempted construction of this article, the court must cut away the one part of the context from all the rest of it, and this for the sole purpose of arriving at the forced, the unnatural, the peculiar and the absurd construction of the last line of the publication which defendant seeks to have the court adopt.

By defendant's requested instructions, the refusal to grant which was assigned as error in the Court of Appeals, he sought to have submitted to the jury not the reasonable

interpretation of the article as it appeared in and of itself, and as it must have been read by the readers of the newspaper in which it was published, in view of conditions then existing in the community, but the interpretation of it according to the intent which the appellant on the witness stand endeavored to have the jury believe existed in his mind.

The case of *Post Publishing Company* v. *Hallam*, 59 Fed., 530 (C. C. A.), held, in an opinion by Judge Taft, that on the question of the meaning of a publication, the thing to be determined was not what defendant intended to charge, but what, in fact, he did charge and what the public who were to read the article would reasonably suppose he intended to charge.

> "The words are to be construed according to their common understanding and not according to the defendant's secret intention." 59 Fed., 536.

It was strenuously urged that the defendant, as a citizen, was exercising his right in commenting upon and criticizing the action, or non-action, of the plaintiff as a public officer. In other words, it is claimed that the doctrine of fair comment applies to the case at bar. It is submitted that the defendant's article of March 28, 1908, cannot fairly be construed as constituting "fair comment" on the failure of the District Attorney to institute new prosecutions against race-track betters.

> "Comment and criticism of the acts and conduct of public men are privileged, if fair and reasonable and made in good faith. But the right to criticize does not embrace the right to make false statements of fact, to attack the private character of a public officer, or to falsely impute to him malfeasance in office." *Hallam* v. *Post Publishing Company*, 59 Fed. 450; *Commonwealth* v. *Wardell*, 136 Mass., 164.

Language is often more significant in suggestion than in expression. *Publishing Company v. Jones*, 83 Tex., 302, 306.

Says Judge Taft, in referring to *Publishing Company v. Maloney*, 33 N. E. 921:

> "The Supreme Court of Ohio say, with reference to the doctrine that statements of fact should be regarded as privileged when made concerning a candidate for an office, as follows: 'We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law for injury to each is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with those having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it. That rule has not been generally adopted in this country, and the converse of it has hitherto obtained in this State.'"

The case of *Chief Justice Prentiss* of the Supreme Court of the State of Vermont against Maloney and Gough, publishers of a newspaper known as the "Gazette," at Richford, Vermont, reported at 83 Fed., 527, is, we submit, next to the *Mattice* case, more directly in point with the case at bar than any other decided case to be found in the books. There the defendants published in their newspaper a squib in the form of an inquiry, the entire article as set forth in the declaration, being this:

> "What the Gazette wants to know: When Judge Royce and his son will dissolve partnership?"

The court held this to be libelous *per se*. The declaration set out this article and set forth further that the son of Judge Royce was a practicing attorney and that in his profession he practiced before the courts over which the plaintiff at times presided, and the *innuendo* claimed that the foregoing publication intended to impute corruption to the Judge in that he was, as partner of his son, interested in fees paid by the litigants represented by the son in cases in which the son appeared before the court as counsel and over which the father presided as Judge. No special damage was alleged and on demurrer it was contended that the foregoing inquiry was not libelous *per se*. On appeal, the court rejected this contention and held:

> "It is objected to the second count that the publication declared upon has no tendency to bring the plaintiff into contempt or ridicule, and so is not libelous *per se*, and is not made libelous by the prefatory averments. But we think the publication, in the light of the prefatory averment, amounts to a charge of misconduct in office and so is libelous if not true."

The contention of the defendant here is about as well founded as the contention of Bennett, which was rejected by the Court of Appeals of New York, in the case of *Moore v. Bennett*, 48 N. Y. 474. There a *possible* but strained and far-fetched construction was attempted to be given to one sentence in a letter, no other part of which referred to plaintiff in any way. Strangely enough, the trial court was led into the error of holding that because this possible construction made the article non-libelous and because the declaration did not allege that the publication was intended to make the libelous charge, therefore, the complaint stated no cause of action and the plaintiff was not entitled to recover. The Court of Appeals not only reversed this hold-

ing, but held the sentence complained of incapable of an innocent interpretation, decided it to be libelous *per se*, and reversed the ruling of the court below.

Moore's declaration charged that a letter which had been written by a widow was afterwards published in his newspaper by Bennett; that in said letter the writer had claimed that certain letters belonging to her deceased husband had been in the hands of a prostitute who had refused to surrender the same upon demand. The letter was a long one complaining about a number of matters, and near its close it contained the following sentence:

> "She (the prostitute) is, I understand, under the patronage or protection of a Mr. Moore, agent of the Central Railroad."

After the publication of the letter by Bennett's paper, Moore sued Bennett for the libel contained in that sentence. The trial court non-suited plaintiff, which action was reversed on appeal, the New York Court of Appeals saying:

> "The plaintiff alleges that this charge respecting himself was false and malicious; that it intended to blacken and injure his reputation and expose him to public contempt. *He was non-suited on the ground that he did not allege that the publication intended to charge that the prostitute was under his protection for illicit purposes, and that, therefore, his complaint stated no cause of action.*
>
> "In my judgment no man can read this statement without understanding that it contained a charge that this woman was the kept-mistress of the plaintiff. To state that Anne Smith is a prostitute, and 'she is under the patronage or protection of Mr. Moore' is to charge that she is kept, protected, or prostituted for the purposes of prostitution. That a loose woman is under the protection of a man named, is a technical statement

that she is supported by him for the purpose of sexual indulgence. When read in a book or newspaper it would naturally have this only meaning. Add to this that the charge was false, made to blacken the character of Moore, and the statement is plainly within the law of libel. No one would understand this statement as meaning that the prostitute was an inmate of a reformatory institution and that Mr. Moore was one of its supporters and thus protected and patronized her. *Such a meaning to the words is possible, but it is most unnatural and forced.* That any intelligent man would so understand the charge would exhibit a degree of charity and kindness of heart not often found in this censorious world.

"I understand the principle to be * * * the scope and object of the whole article is to be considered, and such construction put upon its language as would naturally be given to it.

"It is not enough that a critic or a malignant may torture the expression into a charge of a criminal or disgraceful act. Nor is it enough on the other hand that a possible and far-fetched construction may find an inoffensive meaning in the language. The test is, whether to the mind of an intelligent man the tenor of the article and the language used naturally import a criminal or disgraceful charge.

"In this case the letter was censorious and fault-finding. * * * The suggestion that this language does not, of itself, impute a charge that Mr. Moore keeps this prostitute as his mistress, because she may be under his protection as an inmate of some reformatory institution managed or patronized by him is extravagantly far-fetched, and is hostile to the whole tenor of the communication. The charge that she is under the patronage of Mr. Moore is the culmination of the accusations preceding and was plainly intended to charge a criminal patronage or protection. Every man or woman who read it must have understood such to be its meaning."

While in the case of *Lauder v. Jones*, 101 N. W., 907 (Supreme Court of North Dakota), an alleged libelous article against the judge of one of the district courts of the State was submitted to the jury, under the practice in Federal courts the reasoning of the opinion in that case, written by Judge Young, and concurred in by the whole court, shows how absolutely correct the learned trial court was in this case.

> "It is well settled that it is not necessary to render words defamatory and actionable that they shall make the defamatory charge in direct terms. It may be made indirectly, by insinuation, by sarcasm, or by *mere question*, as well as by direct assertion, and it is no less actionable because made indirectly, and it matters not how artful or disguised the modes into which the meaning is concealed, if it is in fact defamatory.
>
> "It is the duty of the court to see what the rest of mankind sees, and to understand the meaning of the writing as the rest of mankind understands it, and to place itself in the position of an unbiased reader of ordinary intelligence, and thus determine the meaning which the language construed in its natural and popular sense was intended and calculated to convey."

In this case of *Lauder v. Jones* the libelous matter was as follows:

> "About this time it was commonly reported in Edgerwood that Ralph Maxwell was paying Guy Divet, who was at that time Judge William Lauder's private secretary, the sum of $600 per annum. At the same time and place Ralph Maxwell was loudly boasting to his friends that he paid the sum of $4,000 a year for protection and that he got what he paid for."

The court:

> "We cannot see how two minds can differ as to the defamatory character of this writing. In our opinion, the average reader would understand it as charging Judge Lauder with a want of personal and official integrity and with the grossest kind of judicial corruption. Clearly that is the meaning which it is well calculated to convey to the common understanding. * * * It is true, as counsel for the appellant say, that all of the statements contained in the affidavit may be true in point of fact and still Judge Lauder be an honest and upright judge. * * * That possibility, however, does not make the publication the less libelous. * * * Obviously the defamatory character of the writing is to be determined from what it contains, and not by what is omitted from it. * * *
>
> "By insinuation and indirect language, it imputes to plaintiff a charge that in his judicial capacity he was privy to a corrupt arrangement whereby, for a money consideration, he extended protection to the person who is described as a notorious law breaker, and thus enabled him to continue in his unlawful business."

In a case where the court "cannot see how two minds can differ as to the defamatory character of" a writing, under our practice the court should peremptorily instruct the jury that the writing is libelous.

In *Montgomery v. New Era Printing Company*, 229 Pa. St., 165 (22 A. & E. Ann. Cas., 375), plaintiff proved that he was a practicing attorney at law, and that in the alleged libelous article circulated by defendant "plaintiff was charged with presenting a bill twice for the same services in the same case." The Supreme Court of Pennsylvania said of this:

> "The article therefore imputed dishonest and dishonorable action to the plaintiff in his professional

conduct as an attorney. Any oral or written wor
which impute to an attorney at law the want of t
requisite qualification to practice law, or with havi
been guilty of corrupt, dishonest or improper pra
tice in the performance of his duties as a lawyer, a
actionable *per se*."

And the court reversed judgment on a directed verdi
for defendant. And see *Pickford v. Talbott*, 211 U. S
199, affirming 28 App. D. C., 498. If the Supreme Cou
of Pennsylvania was right in the decision just quoted fro
it is submitted that the publication of the defendant in t
case at bar which in a much more vicious manner impute
to the plaintiff improper practice in the performance of h
duties as District Attorney, was undeniably libelous.

The Court of Appeals in this case went to the extent o
holding that unless such a publication charged the plaintiff
falsely with that which, if true, would subject him to a
indictment for a crime involving moral turpitude, or subje
him to an infamous punishment, then the words are no
libelous without special damage. The court based this re
markable position on the *slander* case of *Brooker v. Co
fin*, 5 Johns., 188 (see Record, p. 88). It is respectfull
submitted that this ruling can not be upheld. In direc
contrast is the opinion of Mr. Justice Brewer in *Heather
ington v. Sterry*, 28 Kan., 426. In that case the charg
complained of was that the plaintiff, a city attorney, ha
resigned his office pending important litigation on the par
of the city which had been induced by his advice. Mr. Jus
tice Brewer said:

"The lawyer who has the reputation of advisin
his client into trouble, and then leaving him to get ou
of it the best way he can, is one who would be shunne
by all prudent men in search of legal counsel and as

> sistance; and to charge a lawyer with such a course of conduct is certainly calculated to make him infamous and odious in the sight of all."

And yet the Court of Appeals of the District of Columbia says that it is not libelous to charge a District Attorney with anything short of that which would subject him, if true, to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment. In *Wallace v. Jamison*, 179 Pa. St., 98, it was held that to impute corrupt or dishonorable action to an attorney in his professional conduct in the unlawful settling of a criminal prosecution is actionable *per se* though it falls short of a charge of bribery. Either this holding is wrong or that of the Court of Appeals in the instant case is not sustainable. In *Mattice v. Wilcox*, 147 N. Y., 624, *supra*, New York's highest court, speaking by Mr. Justice Peckham, who subsequently for so many years rendered his country distinguished services on the bench of this court, held to be libelous *per se* a circular reading as follows:

> "Make Burr Mattice attorney for the village, so that every person that gets spunked on the ice will be able to obtain a judgment from $1,000 to $10,000 against the village."

Meaning thereby to charge the plaintiff with want of skill and care, as the attorney for the village. And yet the Court of Appeals of the District of Columbia holds in the instant case that nothing can be libelous with respect to a United States Attorney for this District which does not impute to him conduct which, if true, "will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment."

In seeking a safe rule respecting what is libelous, the

Court of Appeals, after stating that the rule is somewh
indefinite, finds a satisfactory one to apply here in the c
of *Brooker v. Coffin*, 5 Johns., 188, a slander case, and h
that measured by the test of this case nothing published
a United States District Attorney can be libelous unless
contains such a charge that if true will subject the Distr
Attorney to an indictment for a crime involving mo
turpitude, or subject him to an infamous punishment. B
the Court of Appeals overlooked the safe, the authoritati
and the binding rule in force in its jurisdiction to be fou
in the decision of this court in the celebrated libel (n
slander) case of *White v. Nichols*, 3 How., 266, in whi
case this court held actionable not only a publication false
charging the plaintiff with crime, but likewise that whi
charges him with any conduct calculated to exclude hi
from social intercourse or expose him to degradation, co
tempt or ridicule. And this court in the opinion in th
celebrated case, speaking regarding persons in high place
said:

> "These guardian provisions of the law, designed, a
> we have said, for the security and peace of persons
> the ordinary walks of private life, appear in some r
> spects to be extended still farther in relation to perso
> invested with official trusts. Thus it is said that wor
> not otherwise actionable may form the basis of a
> action when spoken of a party in respect of his offic
> profession, or business. * * * Again, * *
> where words are spoken of a person in an office o
> profit, which have a natural tendency to occasion th
> loss of such office, or which impute misconduct in i
> they are actionable. And this principle embraces a
> temporal offices of profit or trust, without limitation

Here we have this court saying that where words ar
spoken of a person in an office of profit which impute mis

conduct in it, they are actionable, in direct contrast to the ruling in the instant case of the Court of Appeals that no words are in themselves actionable unless they charge the plaintiff with a crime involving moral turpitude, or charge him with that which, if true, would subject him to an infamous punishment. It is submitted that the rule laid down by the Court of Appeals could not even be sustained in an action for spoken words, and that it can find no support in any properly considered adjudicated case of libel as to which class of defamation this court in *White v. Nichols* said: "It is treated with a sterner rigor" than verbal slander "because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. It follows, therefore, that actions may be maintained for defamatory words published in writing or in print, which would not have been actionable if spoken."

Despite the rule thus stated, it is to be noted that the Court of Appeals in the case now at bar does not cite in support of any point decided by it in the long opinion rendered below a single case of civil libel, but confines itself to the citation of slander cases, with exception of one English case bearing on the requirements of an indictment for criminal libel. It is respectfully submitted that this court's rule of *White v. Nichols* and the Court of Appeals' rule in the *Warner v. Baker* can not both stand.

The Court of Appeals held that the words used in the defendant's publication "will admit of an interpretation which amounts to nothing more than a permissible criticism of the conduct of plaintiff in his official capacity" (R., p. 88). Such a construction, we deferentially submit, is as far-fetched as that referred to by the court in the case of *Mann v. Pomfret*, 181 Fed. Rep. 76, 81 (C. C. A.), where

a verdict against the publisher of *Town Topics* in an action for libel was affirmed to the extent of $20,000.

In the opinion in that case, Judge Lacombe said (*loc. cit.* 80-81):

> "The paragraph complained of consists of a number of separate assertions, each of which, standing by itself, is perfectly innocent. * * * But words perfectly innocent when standing by themselves may be thrown into such juxtaposition as to become libelous. To effect such a collocation is a common device of experienced paragraphers of personal gossip. When hailed into court they are usually vociferous in asserting that no libelous statement can be found in the article, and frequently seek to beclond the case by introducing much testimony to establish the truth of the several separate statements, insisting that they have thus 'justified' the publication. Thus one may publish of an individual: 'This is the same John Smith who got himself into serious trouble when he was in Arizona three years ago. Horse stealing is not popular in that community.' He may safely assume that any court will take judicial notice of the fact that horse stealing is not popular in Arizona or even elsewhere. He may be able to prove that, when John Smith was in Arizona at the time stated, he insisted on riding a half broken horse, was thrown in an infrequented part of an alkali desert, broke his leg, and lay there two days before he was rescued. But ability to prove the occurrence of such serious trouble would be no justification of the statement which the article by indirection conveyed, that John Smith when in Arizona was discovered to be a horse thief. So in the case at bar, we have an ingenious collocation of innocent assertions, which is certainly well calculated to convey the impression charged in the complaint. Whether or not it was intended to convey such impression was a question for the jury, but we should certainly have a poor opinion of the intelligence of 12 men, who might reach the conclusion that the paragraph was construed with an innocent intent."

So here, the defendant may say that plaintiff was a civil service official, that defendant himself was violently opposed to civil service officials taking part in politics against defendant's office-seeking aspirations, but that would hardly be said to justify the statement which the article which by indirection conveyed, that the plaintiff, while District Attorney, was active in a campaign which was being financed by the race-track, at which, according to the views of some, betting and bookmaking were being carried on in violation of law. It is just as reasonable to say that defendant's publication in the case at bar is fair and permissible criticism of the plaintiff as would have been the supposititious contention referred to by Judge Lacombe regarding the character of John Smith's serious trouble in Arizona.

Authorities might be multiplied indefinitely. The language of the court in *State v. Norton*, 89 Me., 200, the last case we will weary the court with the citation of under this head, seems almost a direct answer to the position of the defendant in the case at bar:

> "The respondent further urges that he asserted nothing against Mr. Plummer, but only asked some questions. It is immaterial whether he asserted, or only suggested, whether he used declarative or interrogative form. Insinuations may be as defamatory as direct assertion, and sometimes even more mischievous. The effect, the tendency of the language used, not its form, is the criterion. The libeler cannot defame and escape the consequence by any dexterity in style.
>
> "The respondent urges still again that the language may, perhaps, be so construed and explained as not to be defamatory, and that if this can possible be done such construction is to be taken as the true one—the one intended by the writer. He endeavors with much ingenuity to show how this can be done in this case. Here, however, the want of sufficient skill in style may

subject the writer to a punishment he hoped to avoid. He should avoid defamatory style as well as defamatory matter. It is not the ingeniously possible construction, but the plainly normal construction which determines the question of libel, or no libel, in written words which are maliciously published. In this case the natural inference from the published language is clearly defamatory."

Appellant here is contending for the ingeniously possible construction, and urging that the possibility that a jury or some members of it would adopt that construction is sufficient reason why a court should submit the question of construction to the jury to determine whether there was libel or no libel. We submit that this is not the law.

The question always is: How did those to whom the words were published understand them at the time? We must assume that they were persons of ordinary intelligence. We must assume, too, that they gave to ordinary English words their ordinary English meaning; to phrases of local application, their local meaning; and that they were familiar with the notorious local conditions existing at the time of the publication (R., p. 154). That being done, what meaning did the whole article of March 28th convey to an unbiased mind?

It was not error to refuse appellant's second requested instruction because (1) said instruction attempted to submit to the jury an impossible, far-fetched and strained construction of appellant's article published in the Washington *Herald*, March 28, 1908; (2) because said instruction is confusing and misleading.

It was not error to refuse to grant appellant's *third* requested instruction (R., pp. 75-6), because (1) said instruction attempted to submit to the jury an impossible and unreasonable interpretation of the publication complained

of; (2) attempted to say to the jury that the publication complained of could reasonably be considered as fair and reasonable comment on the appellee's action as a public official in failing to institute further proceedings against the bookmakers at the race track after the opinion of Justice Stafford in the Walters case; and (3) attempted to segregate and lay special stress on certain features of the evidence to the exclusion of others.

The learned trial court granted the fifth instruction requested by the appellant, which will be found on pages 76 and 77 of the Record. This instruction left it to the jury to consider the truth of the meaning of the publication as intended by the appellant, which intended meaning he had testified to on the witness-stand, and we submit that it was more favorable to the appellant than he was entitled to.

Defendant seeks to escape the consequence of his libel by the artifice of its drafting:

> "But then it is said, and the rule is a sound one, that the law will not shut its eyes to what all the rest of the world can see; and let the slanderer disguise his language, and wrap up his meaning in ambiguous gyrations out, as he will, it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understand it." (*Carter v. Andrews*, 16 Pick., 1.)

It is respectfully submitted that the trial court was right in granting the plaintiff's first instruction, and that the Court of Appeals erred in holding this action erroneous.

FOURTH:

THE COURT OF APPEALS ERRED IN HOLDING ERROR THE ACTION OF THE TRIAL COURT IN GRANTING PLAINTIFF'S SECOND INSTRUCTION (R., p. 73).

In connection with the granting the already quoted first requested instruction of the plaintiff, the trial court granted and read to the jury the following second requested instruction of the plaintiff:

> "If you find that the article mentioned in the declaration was composed and its publication procured by the defendant, then you are instructed that from the publication of such article, the law implies malice on the part of the defendant, and that, without regard to whether there was any actual malice on the part of the defendant in preparing and having published the article in question, the plaintiff is entitled to recover compensation for the injury done to his reputation by the tendency of such publication to bring him into disgrace and disrepute among those who knew him personally or by reputation, and for the mental suffering (if you find that he has so suffered) caused by such publication."

Exception was taken by defendant to the granting of this instruction. In their brief in the Court of Appeals defendant's counsel set forth no reason why this instruction was claimed to be erroneous, and cited no authority in support of their contention that it was erroneous. The Court of Appeals, holding that the granting of this second instruction was error, cites no authority for the holding.

In the trial court, defendant's counsel objected to this instruction "on the ground that it assumes that injury has been done to the reputation of the plaintiff," and did not

limit the damages to be awarded for such injury "if any, as was shown by the testimony." This is equivalent to the contention that the plaintiff could not recover unless he alleged and proved special damages. No other ground was given for the objection to the instruction and the objection was a specific one. We find, therefore, that on this instance the defendant's objection is made because in a matter where the law presumes damage, the jury was not limited to such damages "if any, as shown by the evidence." It is submitted that it is sufficient to dispose of the discussion under this head to cite what is now elementary:

> "General damages are such as the law will presume to be the natural or probable consequence of the defendant's conduct. They arise by inference of law and need not, therefore, be proved by evidence. Such damages may be recovered wherever the tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted." Odgers, p. 203.

> "General damages will only be presumed where the words are actionable *per se*. But damages are always presumed where the language complained of is libel and not simply slander. Thus it is not necessary to prove special damage in any action of libel." Odgers, p. 207.

> "If the libel was sold to the public indiscriminately, heavy damages should be given for the defendant has put it out of his power to recall or contradict his statements, should he desire to do so." Per Ld. Denham, 9 A. & E., 149; per Best, C. J., 5 Bing. 402; Odgers, 324.

Newell, Slander and Libel, 2d Edition, p. 838, gives the rule as follows:

"General damages are those which the law will presume to be the natural or probable consequences of the defamatory words; they arise by inference of law and need not be proved by evidence. Such damages may be recovered wherever the immediate tendency of the words is to impair the party's reputation, although no actual pecuniary loss has in fact resulted."

"We have no doubt when the words spoken are actionable in themselves that mental suffering produced by the utterance of them is a proper element to be considered in fixing the amount of damages." Per Scott, J., Adams v. Smith, 58 Ill., 421; and Newell says that as to this the law is well settled, p. 841.

We submit that the trial justice was right and the Court of Appeals wrong with respect to this instruction.

CONCLUSION.

We earnestly submit that in no view of the case can the Court of Appeals be sustained in directing that judgment on verdict for plaintiff be arrested. We further submit that the defendant was accorded a fair and impartial trial, that every material question in issue was submitted to the jury, that the finding by the jury of the existence of the extraneous facts summarized in plaintiff's first instruction rendered inescapable the conclusion, respecting which reasonable minds could not differ, that the matter published by the defendant at the time of the existence and in the light of those extraneous facts was a libel on the plaintiff.

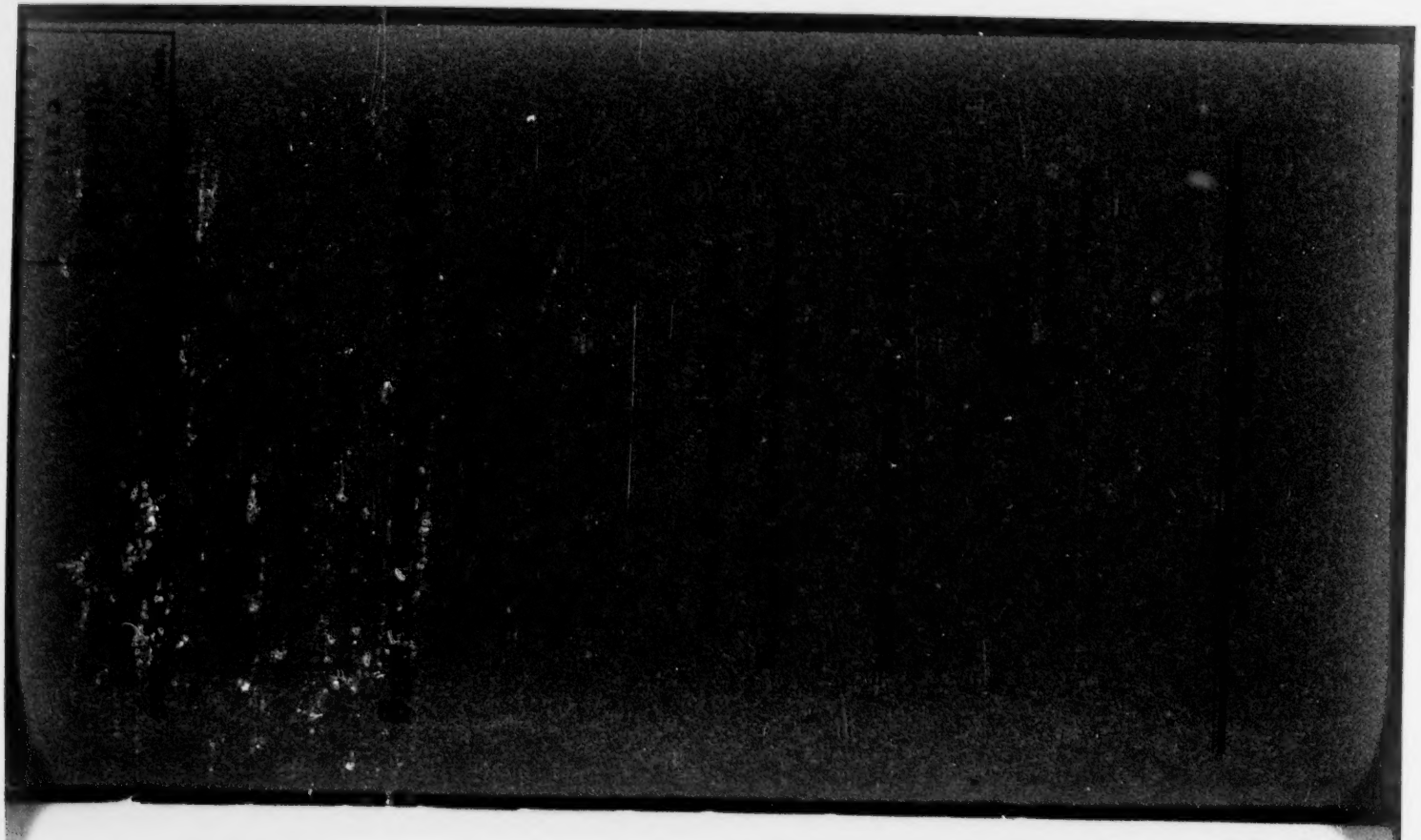
It is respectfully suggested that action of this court should be had on the writ of error in case No. 42, and, if this is correct, then the writ of error in case No. 41 should be dismissed. It is submitted that the judgment of the Court of Appeals should be reversed, and the case remanded

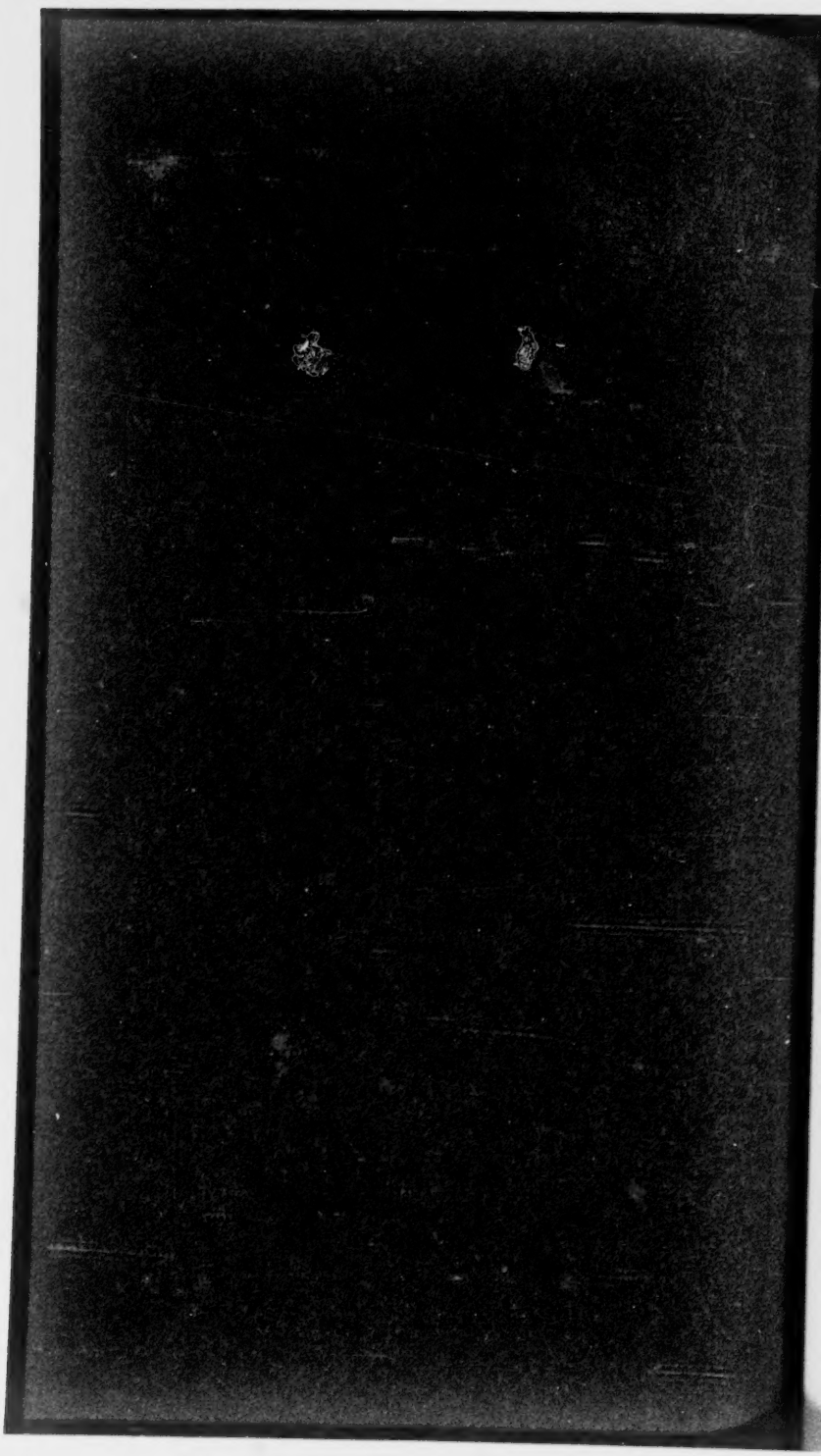
with directions to affirm the original judgment entered in the trial court on the verdict of the jury for plaintiff.

Respectfully submitted.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.,
October 27, 1913.





INDEX.

TABLE OF CASES.

STATUTES AND TEXT BOOKS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

Nos. 41 and 42.

DANIEL W. BAKER, *Plaintiff in Error,*

vs.

BRAINARD H. WARNER, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

These cases present objections to a judgment below in an action of libel in which the plaintiff in error was plaintiff and the defendant in error was defendant. The alleged libel consisted of a publication by the latter in the Washing-

ton *Herald* of March 28, 1908, of a political campaign advertisement, which the plaintiff in error, hereinafter referred to as the plaintiff, claimed was in substance an allegation that he was receiving money for political purposes from the Washington Jockey Club, in consideration of his omission, in his capacity as United States Attorney for the District of Columbia, to prosecute alleged violations of the Gaming Act, at the race-track of the Association. No. 41 is here upon a writ of error to a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of that District in plaintiff's favor and remanding the cause with direction to arrest the judgment in accordance with a motion in arrest duly made below, while No. 42 is upon a writ of error to the judgment of the Court of Appeals affirming the action of the court below in granting the motion in arrest.

In each of the two counts of the declaration, which differ only in the innuendo, it was alleged in the *inducement* and *colloquium* that the plaintiff was the United States Attorney for the District of Columbia, charged with the duty of prosecuting violations of the laws of the District; that, at the time of the publication of the article, horse races were in progress at the race-track of the Jockey Club, at which bets or wagers upon the results of the races were being laid by persons whom it was the duty of the plaintiff to prosecute if such betting was a violation of any of the laws in force in the District; that the plaintiff had prosecuted one John Walters, under a charge of setting up a gaming table at the race-track or course, in which cause a demurrer to the indictment had been sustained by the justice of the Supreme Court of the District of Columbia presiding in the Criminal Court, on March 11, 1908, from which decision the plaintiff was prosecuting an appeal to the Court of Appeals of the District of Columbia, and that, conforming

himself, as it was his duty to do, to the law as it was judicially construed by the Supreme Court of the District of Columbia, he had not ordered warrants to be issued or made presentments to the grand jury in the case of any other persons laying such bets or wagers; that the defendant was a candidate for the Republican nomination to Congress from the 6th Congressional District of Maryland, and was publishing numerous advertisements in support of his candidacy in the Washington *Herald*, which paper had a large circulation in the District of Columbia and elsewhere in the United States and foreign countries, and that, maliciously contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney for the District of Columbia, the defendant composed and published in the *Herald* of and concerning the plaintiff and of and concerning his said office the alleged libelous article, stating among other things, that the plaintiff had gone to Rockville to attend a conference of defendant's enemies and to determine what ammunition was needed to defeat him, and concluding as follows:

> "The question now is, Where does the money come from in the contest against Mr. Warner? (Meaning the defendant, Brainard H. Warner.)
> "How about the race-track?"

The foregoing comprised the inducement and colloquium in each of the two counts, which are in *ipsisimis verbis*.

To the first count an innuendo was added, to the effect (1) that the said publication was intended to convey that the plaintiff entered into a conference with others for the purpose of determining *"what funds were necessary, or how the same should be raised," on behalf of Pearre against Warner in the contest for the nomination;* (2) that

the appellee was obtaining funds for said campaign from the Jockey Club or persons interested in the race-track or in the laying of bets on the races; (3) that he was corrupt in the conduct of his official duties as United States Attorney for the District of Columbia in refraining from the indictment and prosecution of the said persons, in consideration of money contributions for use in the said campaign; and (4) that he was a corrupt, dishonest and unworthy person, and was influenced in the discharge of his duties by the contributions of moneys for use in opposition to the candidacy of the defendant; by reason whereof the plaintiff had been greatly injured in his good name, etc., in so much that divers citizens now believed him to be a dishonest and unworthy person, guilty of the wrong alleged of him as the said United States Attorney, to his damage in the sum of $50,000.

The innuendo to the second count alleged that the publication was intended to convey (1) that the plaintiff was acting corruptly in the performance of his duties as United States Attorney, and (2) that he was being influenced in the discharge of those duties by contributions of money from persons interested in the race-track or in having gambling permitted or carried on thereon, the said moneys to be used against the defendant's candidacy for the office of representative in Congress, by means of which the like injury and damage had resulted to the plaintiff.

Neither the inducement nor the colloquium of either of the counts composing the declaration, it will be observed, alleged any one of the matters and things thus set forth in the innuendos, with the single exception of the words above italicized, which are not actionable; nor does either allege that the Jockey Club, or any person or persons interested in gambling at the race-track, were sources from which the plaintiff, by reason of his official position or

otherwise, might unlawfully or improperly obtain money, or that the words complained of were written or published with reference to any illegal or improper obtaining of money by the plaintiff from the Club, or from any other persons, or that they were published with reference to the non-prosecution of the race-track gamblers, or with reference to the performance or non-performance of any official duty whatsoever owing by the plaintiff, or with reference to the obtaining of money at all, or in reference to the Washington Jockey Club, or with reference to its race-track, or with reference to gamblers or gambling thereon, or with reference to any race-track gamblers, or gambling at any time or place. All these averments, without which, or some of them, no cause of action is stated, are left exclusively to the innuendo.

In each of the counts much space is devoted by way, apparently, of anticipating defences, to the explanation of plaintiff's omission to prosecute further than is there set out the race-track gamblers or bookmakers; and, as will further appear from the bill of exceptions (Rec., pp. 15-18, 19-24, 26-36), a very large part of the evidence for the plaintiff in chief was devoted to the like purpose, with a view to anticipating, it would seem, the contention of the defense, made promptly by defendant when his evidence came to be taken, that the reference of the inquiry, "How about the race-track?" was, simply, to the conduct of the plaintiff in devoting himself to an inter-party political contest in Montgomery County while the race-track bookmakers were being allowed to pursue their calling without molestation, interference or attempt at prosecution, over the protest of the Commissioners of the District of Columbia, the Superintendent of Police, the newspapers, the clergy and the community generally.

It may, perhaps, promote both brevity and a clear understanding of this phase of the case to state, at this time, the legal status of the question as it then existed in regard to the legality or illegality of race-track gambling, and the amenability of the so-called bookmakers to prosecution. The pertinency of the inquiry, in so far as is known to defendant's counsel, was to determine whether there was inactivity on the part of the appellee in that direction under circumstances which rendered the words "How about the race-track?" fair or reasonable comment, in the sense in which the defendant claimed they were intended and used.

The first section of the Act of Congress of January 31, 1883, now represented by Section 865 of the Code, provides:

> "Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimble, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years."

Section 4 of the Act (Sec. 868 of the Code) provides:

> "All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of these sections; and the courts shall construe the preceding sections liberally, so as to prevent the mischief intended to be guarded against."

By Section 1 of the Act of April 26, 1888, as amended by the Act of March 2, 1891 (Section 869 of the Code), it was provided:

> "It shall be unlawful for any person or association of persons in the cities of Washington and Georgetown, in the District of Columbia, or within said District within one mile of the boundaries of said cities, to bet, gamble or make books or pools on the result of any trotting race or running race of horses, or boat race, or game of baseball. Any person or association of persons violating the provision of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both."

Under this state of the law, one Miller had been indicted for bookmaking at the race-track of the Washington Jockey Club, which is also known as the Bennings Race-Track, the indictment consisting of two counts, namely; first, a count charging that at a certain time *and place*, the place being simply "within the District of Columbia, but distant more than one mile from the boundaries of Washington and Georgetown," the defendant set up "a *certain gaming table*, to wit, the gaming device or contrivance called bookmaking, on the race aforesaid," which was "a gaming device, adapted, devised or designed for the purpose of a game of chance for money"; and, secondly, a count charging that "the defendant at the time and place aforesaid, the place being more than one mile from the boundaries of the cities of Washington and Georgetown, *did set up and keep a place* for the purpose of gaming, a booth," and did cause idle and evil-disposed persons to come together to gamble upon the said game, device or contrivance called bookmaking. A demurrer to the indictment being overruled, and the defendant appealing, the Court of Ap-

peals of the District of Columbia (Miller vs. U. S., 6 App. D. C., 6) held:

1. That a gaming table within the meaning of the Act of 1883 was any gaming device or contrivance set up or kept for the purpose of gaming, or adapted, devised or designed for the purpose of playing any game of chance for money or property, and to which the public might resort to wager property or money.

2. That the definition of a gaming table under the statute did not involve the ordinary, mechanical definition of a table, but embraced, simply, or "depends for its statutory meaning upon," the means or contrivance adopted for playing a game.

3. The the Act of 1888, as amended by the Act of 1891, did not confer the right to violate the provisions of the Act of 1883 provided such violation was more than one mile beyond the boundaries of Washington and Georgetown, but referred to a wholly different offence, namely; the act or offence of betting, as distinguished from the setting up of a gaming device, the prevention of which latter offence was the scope and purpose of the Act of 1883.

The Miller case, according to plaintiff's testimony, was followed by what is known as the Klein case, in the Supreme Court of the District of Columbia, in which the trial justice, as testified by the plaintiff (Rec., p. 23), intimated that the Miller case was not law, and held, in effect, that an indictment could not be maintained under the Act of 1883 unless there was a *locus* or place, *i. e.*, some specific *locus*, place or circumscribed area at or in which the gaming device was set up and maintained. This was followed by the case of one Davis, a prosecution instituted by the plaintiff against a bookmaker who had a few stools grouped together at the race-track, a sheet, and a writer who kept upon that a sheet a record of bets made, so that, after the

contest, the bettors could be identified, which were practically the same facts as in the Klein case (Rec., pp. 31-2), in which Mr. Justice Stafford (Rec., pp. 26-9) held that conviction could be had, contrary to the decision in the Klein case, and from which conviction in the Davis case, had on November 11, 1906, an appeal was taken to this court, and was remaining on the calendar unheard and undisposed of on March, 1908, when the Spring Meet of that year was in progress and the allegel libel was published.

The fourth and remaining decision upon the subject at the time of the alleged libel grew out of the fact that, following the Davis decision, the bookmakers no longer located themselves on stools, but "moved around," instead of standing in one place (Rec., p. 23)—they "circulated around within the Grand Stand, holding in their hands a program, standing in one spot for a moment, and then moviag to another place, receiving bets from men; that the odds would be exhibited on the program which they held, with the names of the horses on it, the bookmaking being done by a man who had a small memorandum book in his hands, in which he recorded bets, and another man with a pocketbook, who accepted the money" (Rec., p. 36). "After the Davis case, the bookmakers had a small program, *instead of a board* with the odds marked on it; one of his assistants with a memorandum book, *instead of a lapboard*, for the betting sheet, on which he recorded the bets, and the other assistant had a pocketbook, *instead of a money box*, into which he put the money," the italicized words indicating the outfit in the Davis case.

Thereupon the plaintiff brought another test case, this time against one Walters, which was demurred to, and the demurrer sustained by the Supreme Court of the District in an elaborate opinion set out at pages 29-36 of the record. Upon his direct examination, the plaintiff testified that, at

the argument of this demurrer, the court raised the point that the indictment charged bets or wagers with "divers persons, which might mean two or more persons only," and that the plaintiff had informed the attorneys of the Jockey Club, between whom and himself the indictments had been gotten up for the purpose of a test case (Rec., p. 17), that, if they went off on that point, he would have to file other indictments, alleging gaming with a large number of persons, but that Justice Stafford, when he came to decide the case, did not decide it upon that point at all as the plaintiff remembered (Rec., p. 18); but, upon his attention being called to the opinion in the case, he conceded that, in sustaining the demurrer, Mr. Justice Stafford had stated (Rec., p. 22): "But, as already observed, the present indictments do not charge that the bookmaking was carried on as a business, and if that is, indeed, the very fact that changes lawful bookmaking into unlawful bookmaking, as the Government contends, it ought surely to be alleged with positiveness and distinctness," and further stated: "Neither of these counts charges anything more than divers acts of bookmaking in the territory where it is conceded that bookmaking, pure and simple, is lawful. Hence they are insufficient"; and, further, "None of the counts charge expressly that the defendant was carrying on bookmaking as a business. They charge that he offered to take, and did take, bets from divers persons, that he exhibited a program on which were displayed the odds he was offering. The exhibiting and offering are alleged to have been made to divers persons, which would be satisfied by a proof of two or more, such being the definition of 'divers'" followed by a further quotation from the opinion of Mr. Justice Stafford, at page 22, that, under the decision of this court in the Miller case, the distinction between the setting up of a method of betting on the one hand, and using

that method on the other, was somewhat metaphysical and difficult to apply; and that in neither count was a state of facts set forth that showed anything more than bookmaking as it must have been understood by Congress when Section 869 was enacted, prohibiting bookmaking only in the cities of Washington and Georgetown and within one mile thereof.

The distinction in the Miller case, thus referred to in the Walters case, was in effect, that the Act of 1883 prohibited the setting up of a "gaming table," that is, any gambling device, which included bookmaking, anywhere within the District of Columbia, while the Act of 1888, amended by that of 1891, punished, simply, the act of betting or gaming. Persons might, outside of the prescribed territory, "make books," or bet with each other, without violating the Act of 1883, which prohibited, only, the setting up or maintaining of a gaming table or device for public gaming; under the Act of 1888 they might make books with each other within the unprohibited territory. The indictments in the Walters case, charging the making of bets "with divers persons," the learned Justice held did not necessarily charge the setting up of a gaming device or public gambling, but were consistent with mere bookmaking between or by two persons, which would not constitute public gaming in the sense of the Act of 1883. The plaintiff, as he testified, construed the decision to mean that no indictment could be maintained to cover the shifting method resorted to by the race-track bookmakers to evade the Davis decision, namely; the shift of taking bets while moving about in the Grand Stand with their paraphernalia, instead of keeping to a particular stool or group of stools.

The Davis case, as above stated, had resulted in a conviction, and had been appealed to this court in November, 1906. Upon the strength of this mere device of moving

about in the Grand Stand, the bookmakers had been allowed to pursue their calling at the Spring Meet in 1907, and again at the Fall Meet in the same year, without molestation, and were again plying their vocation at the Spring Meet of 1908 when the alleged libel was published, without any further attempt at prosecution than the making of another test case, namely, the Walters case, in January, 1908, the Jockey Club, itself, designating the individual to be indicted, furnishing the paraphernalia, and having its attorneys co-operate with the plaintiff in framing indictments in a number of different ways, so prepared that attorneys for the Jockey Club could demur to an indictment prepared by the plaintiff, which contained six counts, describing every phase of gambling then carried on, and another indictment, prepared at the suggestion of the attorneys for the Jockey Club, describing the bookmakers as doing business without the assistance of any person (Rec., p. 17). These isolated test cases were resorted to, instead of a raid upon the entire business of the bookmakers, who were some fifty in number, "because these men had invested hundreds of thousands of dollars, had been carrying on this same sort of thing before plaintiff had been admitted to the Bar, because his predecessors had refused to make raids, and every case tried had been a test case" (Rec., p. 24); that he was at first disposed to make a raid, but was dissuaded from doing so by some of the persons interested in the Jockey Club, and also by some of the assistants in the office, who stated that the Jockey Club had been running races regularly throughout the administrations of several district attorneys, and one of his assistants differed with him, "thinking the Klein case was the law, and that they ought to let it stand," though plaintiff thought otherwise (Rec., p. 16). Plaintiff's assistant testified that the agreement to make a test case, instead of arresting the

bookmakers, was because the latter course "would have been an unfair and unjust thing, because the Jockey Club and the men betting at the race-track had been permitted to do it ever since the Klein case, and thought they had a right to do so. They had made arrangements for the Meet, involving thousands of dollars of expense to the Jockey Club, to the merchants, and to the men who came here. The reason for wishing to make a test case was because there was so much involved; there were probably fifty bookmakers out there, each of whom had about the same paraphernalia" (Rec., p. 37).

The plaintiff testified that, after the Walters decision, he had had an official request from the Commissioners of the District of Columbia in reference to further prosecutions; that a couple of detectives and policemen called on him, sent by the Chief of Police, in reference to the same matter, and that there was some agitation as to the arrest of the bookmakers or stewards of the Jockey Club, on the charge of permitting a gaming table to be set up, "but Judge Stafford's decision tied plaintiff's hands and he could not and did not do anything, solely because of the situation developed in the trial of the Waters case" (Rec., p. 19); that he refused the request of the Commissioners to prosecute; that he did not know whether the Rev. Mr. Crafts had called his attention to Judge Stafford's intimation that the indictments were defective in not alleging that bookmaking was being carried on as a business, but, if so, he had declined to prosecute, and contradicted him; he knew that the press was pointing out that Judge Stafford had so intimated; that he thought he had read the *Herald* editorial of March 12th (see Rec., p. 52), but, as it did not state what Judge Stafford had said, he paid no attention to it, and the editorial was not true; that his sense told him he would have to charge the carrying on of bookmaking as a

business, and that he could charge in the indictment what Judge Stafford said he had not charged, namely, that the bookmakers were inviting bets from everybody, but that Judge Stafford seemed to think this would make no difference (Rec., p. 24).

To take up, next, the facts more immediately connected with the alleged libel, the plaintiff offered in evidence the issues of the Washington *Herald* of March 28th and March 30th, in the first of which appeared the following advertisement, composed, inserted at the request of, and paid for by the defendant:

"WARNER'S POLITICAL CONTEST.

"Colonel Pearre said in his great onslaught on Mr. Warner a few days ago:

"I regard his candidacy as a joke. If I had a monkey and hand-organ I could get up a crowd anywhere.

"This was a fine expression for a statesman, but not wanting in dignity so much as a Justice of the Supreme Court of the District of Columbia who, with the U. S. District Attorney, went to Rockville last Saturday to attend a conference of Mr. Warner's enemies and determine what ammunition was needed to defeat him.

"The question now is, Where does the money come from in the contest against Mr. Warner?

"How about the race-track?

"LAWYER."

The issue of the Washington *Herald* of March 30th contained the following advertisement, composed, published at the request of, and paid for by the appellant:

"WARNER'S CAMPAIGN FOR CONGRESS.

"What a desperate fight he has on hand. Justice Gould of the U. S. Supreme Court of the District of Columbia and Hon. D. W. Baker, U. S. District Attorney for the District of Columbia, are against him.

"They both attended the anti-Warner conference at Rockville a week ago Saturday, where a general discussion was indulged in as to how Warner could be beaten.

"Why not stay at home and try and close the Race-Track Scandal?

"ROCKVILLE."

Thereupon occurred the following (Rec., p. 14):

"Mr. Darlington (attorney for defendant): In offering these papers, do you offer the whole paper; everything in the issue that related to the race-track?

"Mr. Hogan (attorney for plaintiff): Yes.

"Mr. Darlington: Everything in the issue about the race-track will go in?

"Mr. Hogan: Yes."

Then followed what appears at pages 14 and 15 of the record in regard to the admission of all issues of the *Herald*, from March 6th, when the agitation against the race-track began until the publication of the alleged libel, as a part of the atmosphere surrounding the agitation, and as a part of the case. This was followed by what appears at pages 41 to 44, culminating in the statement of plaintiff's counsel that "we now limit our offer to these two articles," *i. e.*, the advertisements of March 28th and 30th, and the further statement by his counsel, at the foot of page 46 and at the top of 47, that only the articles published by the defendant had been offered. At page 50 of the record, with reference to this subject, the court said:

"It ought to appear in some way or other that the court is not a party in any wise to any agreement between counsel.

"Mr. Darlington: It was made in open court and on the record, without any indication on the part of the court that it was not so understood.

"The Court: I did not then so understand it.

"Mr. Davis: All of what is in the record on that point will go in, and it will fail to show a stipulation."

The plaintiff testified that, in the spring of 1908, there was a spirited contest in Montgomery County between the appellant Warner and Colonel Pearre, the incumbent, for the Republican nomination to Congress; that plaintiff had aided the latter in every proper way he could, but had received no assistance from any one connected, directly or remotely, with the race-track; that it was not true as alleged in the article complained of that plaintiff and a Justice of the Supreme Court of the District of Columbia had gone to Rockville to attend a conference of the defendant's enemies and to determine what ammunition was needed to defeat him; that they went there to meet many representative people, but not to determine what ammunition was needed for the purpose stated; that there was, first, a meeting of the County Committee, of which plaintiff was a member, to appoint the judges of election and fix the places where the primaries were to be held; that, after the adjournment of the County Committee, he and Judge Gould met certain representative people of the county to talk over Pearre's prospects, etc.; that all favoring Pearre were asked to remain, they talked over his chances, the matter of getting funds, whether it was necessary to get up a campaign fund, it being represented that the defendant's money had flooded the county, that certain colored politicians had been purchased; that they discussed how the defendant

could be defeated, and that this was what the plaintiff went to Rockville for.

They discussed whether they should put up a campaign fund, but did not call it ammunition. Sedgwick, a colored politician there, did not say to plaintiff that his district was pro-Warner, but could be carried for Pearre by the use of money and whiskey; he might have said that defendant had money and whiskey there and that it might take something to overcome that; he thinks it was determined that some money was needed for the campaign, and they would get up a small fund, and that plaintiff, personally, agreed to put up some money for certain districts and did so; his memory is that no one said, at the meeting, that his district could be carried with money, though in the after-talk that might have been said; he doesn't remember whether Mr. Purdum said it would take $100 to carry his district, and that plaintiff asked him whether $50 then and $50 later would do, but he may have done so; he does not remember whether $50 was paid Purdum then by Mr. Blair, or whether plaintiff told Blair to give him $50 then and $50 later (Rec., p. 25).

Testimony of substantially the same character as to the purposes of the visit to Rockville, and what occurred there, was given by the Justice who accompanied plaintiff on that occasion (Rec., pp. 39-41).

It appearing from the testimony that, notwithstanding the conviction of Davis in November, 1906, the bookmakers had been allowed to continue their operations at both the Spring Meet and the Fall Meet of 1907, without change except that they "circulated" in the Grand Stand instead of being stationary there; Harvey Given, Esq., a member of the Bar and plaintiff's assistant as District Attorney, testified that arrangements were made in January, 1908, for the indictment of one Walters, the Spring Meet oc-

curring in the following March, and that plaintiff and witness did not discuss the feasibility of getting a test case through the Court of Appeals between that time and the Spring Meet of 1908; whereupon defendant, by his counsel, inquired of the witness whether, as a member of the Bar, he had ever known a case to go through the Court of Appeals in two months, the exclusion of which question by the court, under objection, being the subject of the first exception in the case (Rec., p. 38).

At the conclusion of the plaintiff's testimony, counsel for the defendant made his opening statement to the jury (Rec., pp. 44-6), stating, in substance, that the defendant expected to prove that the plaintiff had gone from the District of Columbia, his official place of duty, to take part at Rockville in an inter-party contest for the nomination of the Republican candidate for Congress; that he took an active part in the discussion of what money was needed to carry different electoral districts; that for days prior thereto the Commissioners of the District of Columbia and others, directly and through the public press, had been calling upon him to take steps to prevent the gambling at the race-track; that the Superintendent of Police had appealed to him for warrants authorizing the arrest of bookmakers, that the clergy were appealing to him from their pulpits to stop these operations, and that representatives of the community generally had called upon him and urged that steps be taken to that end; that the press of the city was practically unanimous in stating that something should be done; that the plaintiff refused to do anything himself, or to issue warrants to anyone else to do anything; that his course in that regard had been the subject of criticism from all known and usual sources of criticism of a public official; that the defendant's advertisements in the *Herald* were in accordance with the usual course in Maryland politics

of advertising a candidacy; that, prior to writing the article complained of, the defendant had learned that the plaintiff had attended the Rockville meeting, and had called personally upon representatives there to say what was needed to carry their districts against the defendant; that many of them had reported that they could be carried only by certain instrumentalities, among which whiskey was specified, and that, in at least one instance, a representative had been referred by plaintiff to a source of supply from which money could be had for such purposes; that the article complained of was written under the inspiration of this information; that, in it, the appellant had stated three things, namely: first, that he considered it undignified for the United States District Attorney for the District of Columbia to take part in a meeting at Rockville, of black and white political workers, for ascertaining what money or means were needed to carry the various districts, and for providing such means, which action he considered a legitimate subject of comment; secondly, that he considered it a public subject of inquiry, to which the attention of the voters might properly be directed, to learn where the money was coming from which was being used to defeat him; and, thirdly, that he desired and thought it was his right to call attention to the fact that, while the District Attorney was engaged in proceedings of this character, the race-track was in full blast, and the people had a right to know what he was going to do about it, just as the Commissioners, the Police Department, the press and the clergy and business community had for days been asking the question with which the article concludes, namely: "How about the race-track?"; that these were the only objects of the article; that the public authorities, the press and the community had for weeks been urging that prosecutions should be instituted in which the defect pointed out by Judge Stafford in

the Walters case, namely: that the indictments in that case charged betting "with divers persons" only, and not with any and all persons, or in such a sense as to constitute a business, should be obviated.

Whereupon, at the close of the opening statement, the plaintiff, by his counsel, demurred thereto, and requested the court to rule that the defendant could offer no testimony to meet that which had been offered on behalf of the plaintiff, when, after some discussion, the presiding justice suspended action upon the motion, and permitted the appellant to offer testimony on his own behalf.

Thereupon James T. Purdum testified that, at the Rockville meeting, plaintiff asked witness how much money was needed for Pearre in his district; that witness answered $100, of which $50 would do then and $50 later on; that they went out into the hall, where the plaintiff asked Mr. Blair to give witness $50, which Blair did; that the plaintiff called on another district, whereupon one Sedgwick said it would take a good deal of money and whiskey to carry that district for Pearre (Rec., p. 48).

The Mr. Blair here referred to, it had been shown by plaintiff's testimony, was a candidate for the position of delegate to the Republican National Convention, and had been promised Pearre's support for that position if he carried Montgomery County for Pearre, and he had agreed to finance the county in Pearre's interests, to that end (Rec., pp. 9-40).

Thereupon the defendant (Rec., p. 48), offered, as part of the circumstances under which this publication was made, and as a part of "the atmosphere of the case" (see Rec., pp. 24, 41-2), a publication in the Washington *Herald* of March 7, 1908 (Rec., p. 50), to which offer the plaintiff objected, whereupon the presiding justice ruled that the publication of March 28, 1908, was not susceptible of

two interpretations; that the only justification of the publication contended for by the defendant was contained in the article of March 30th, which he had offered in evidence, but that the court could not permit the jury to draw such a conclusion from that article, which was published two days later, and which "may have been published" to take out the sting of what had been published in the previous article; that the concluding paragraph of the article, "How about the race-track?" had the same signification to the mind of the court as if the article had stated that the money came from the race-track people whom, it was claimed, the plaintiff was not prosecuting with the diligence with which some thought he should have prosecuted them; that the prior articles which appeared in the public press could throw no light upon the intent with which the article was published, where the intent is manifested by an article which is libelous *per se;* that the purpose and intent of one who libeled another "could not be twisted by asserting that the libelous matter was induced by the honest and fair comment of other people;" that the court's ruling did not exclude evidence upon the question of whether compensatory or exemplary damages should be given, but that the court would sustain the objection to the newspaper articles when offered on behalf of the defendant formally for the record.

Thereupon the defendant offered, separately and severally, each of the several newspaper publications set forth at pages 50-55 of the record, and stated that each of the extracts was offered on three grounds, namely: First, they were covered by the stipulation of record between counsel that everything relating to the race-track within these issues might be admitted; second, as tending to show the facts and circumstances surrounding the situation under which the article sued upon was published, and, therefore,

as tending to show the reasonableness of the construction contended for by the defendant as to the meaning and intent of the article; and, thirdly, as tending to show the facts and circumstances under which the defendant published the article, and, therefore, as substantiating or corroborating the testimony which was expected to be offered on his behalf, that the article was published with a wholly different intent from that which the court had found it to bear, and as bearing upon the question of the character and amount of damages (Rec., pp. 49-50). The defendant also offered to prove, in connection with each of the extracts offered, that they were all read by him, that none of them had been contradicted, refuted or denied in any way, and that he believed them to be true; that it was in this condition of the public mind, in the community generally, that the article was written, and that the words "How about the race-track?" were used to indicate a comment upon or criticism of the action of the District Attorney in leaving the race-track scandal unattended to while engaging in local politics in Maryland (Rec., p. 55).

The plaintiff objected to each and every of the articles offered, the court sustained each objection, and duly noted on its minutes the exception of the defendant to its action in so doing (Rec., pp. 50-55).

Thereupon, the plaintiff objecting that the offer of the said extracts was an attempt at justification without pleading the same, the defendant moved for leave to file the amended plea set forth at page 56 of the record, which motion was denied by the court on the ground that the defence set up in it could be made under the general issue, to which ruling exception was duly made and noted on the minutes of the court.

The defendant, as a witness on his own behalf, testified that the articles published in the *Herald* were published for

no other purpose than in the interests of his candidacy for the nomination to Congress; that the reference of the article of March 28th to Colonel Pearre's statement in regard to a monkey and a hand-organ, was to point out what he considered a very undignified proceeding on the part of a candidate for Congress; that his second reference in the article was intended as a statement of objection to the action of the United States Attorney in going outside of the District for which he was appointed, to indulge in political conferences; that the reference in the article to determining "what ammunition was needed to defeat Warner," was because of information defendant had received that the District Attorney had acted as floor manager at the Rockville conference, had asked representatives from different districts how much money or other means was needed in them to defeat him, the representatives being called upon one by one and sent out into the hall to get the necessary money, there being in that room, at the time, in violation of the spirit of the civil service law, several postmasters, one departmental employee, and the United States District Attorney, which circumstances the defendant presented for the consideration of the readers and public as being what he considered improper conduct; that the inquiry of the article where the money came from in the contest against him was because he wished to know that:—he wished to know whether this money was coming from these Government employees, or was being given by Mr. Pearre or Mr. Blair, and that, with respect to the concluding paragraph of the article, "How about the race track?", he had had no idea or thought of libeling the plaintiff; that he did not consider that he or any other officer in his position would be foolish enough to take money from the race-track people for any political purpose; that the air had been full of this race-track business for some time past; that his attention

had been called to it and he had himself been engaged in efforts to break up the pool selling; that objections were coming from all parts of the District, from mothers, fathers, teachers and preachers; that he thought the plaintiff was wrong in not making any response to this public clamor, not only from citizens but from the Commissioners; that information had come to defendant in regard to the policy of inaction in the matter through the press; that he had had several interviews with the corporation counsel of the District of Columbia, had talked with various other persons, and had reached the conclusion that the indictment in the Walters case was defective, in that general gambling was not charged but only gambling with divers persons, which could mean two or three and not the public generally; and that he had gotten an opinion from the corporation counsel that other cases could be made which would govern the case.

The question then was propounded to the defendant by his counsel whether he had read each and every of the articles in the Washington *Herald* which had been offered in evidence and had been excluded by the court as above set forth, which question, on objection on behalf of the plaintiff, and subject to the defendant's exception, the court excluded (Rec., p. 55).

He further testified that he first learned or gained any conception that his article of March 28th was liable to be understood as indicating that the race-track was, or might be, the source from which money was being obtained by plaintiff or by anyone else for use in the campaign, on March 31st (Rec., p. 67).

The defendant, subject to exception, was not permitted to testify that he had not furnished whiskey in order to carry his nomination, as plaintiff's evidence tended to show was being charged against him at the Rockville meeting

(Rec., p. 58). In like manner, subject to exception on his behalf, objection to the testimony on his behalf that Montgomery County was what is known as a dry county was sustained by the court, notwithstanding the purpose of the testimony, as set forth at page 59 of the record.

Thereupon (Rec., pp. 59-60) the following question was propounded to the defendant by his counsel:

> "I will ask you to look at this article of March 30th, which has been introduced in evidence and state whether you wrote and published that article?
>
> "A. I did.
>
> "Q. And if so, what was your intent in doing it and the meaning which you intended by it?"

This question was objected to on behalf of the plaintiff, on the ground that "the jury is to ascertain the intent as well as the meaning of the paper from the paper itself, and the circumstances under which it was given publication, and on the further ground that this article was not in suit, and that by the question the defendant was called upon to construe his own self-serving declaration," whereupon the following ensued:

> "Mr. Darlington: Who put it in, and why?
>
> "Mr. Davis: Never mind. I am talking about the testimony. You are at liberty to read that article to the jury and to comment on it as you please, but I say by no principle of the law, and under no rule of evidence is it permissible for a witness to explain a self-serving declaration made after the fact under inquiry.
>
> "The Court: Let me look at that paper. I have forgotten what it is.
>
> "Mr. Darlington: This article was introduced by the other side as a part of their case, for some purpose. I submit we have a right to explain it, just as we did the other one.

> "The Court: Mr. Darlington, I do not think that article is in controversy. I do not exactly see the relevancy of the testimony. I allowed the other to go in because it went to another question entirely, upon a different theory, because I had ruled that in my judgment the other article was libelous *per se*. I do not so rule as to this one. They have some motive in offering it in evidence, I suppose. I don't know what the motive was, and I don't see the relevancy, therefore, of any explanation about it. I do not see that it explains anything. The article explains itself. I sustain the objection"—

to which ruling of the court the defendant duly excepted (Rec., pp. 59-60).

On cross-examination, he testified that he thought the plaintiff, though a presidential appointee confirmed by the Senate, was within the civil service regulations, which prescribed that, while such an officer might take a proper part in a campaign, he was to avoid petty participation, calculated to bring scandal upon the Department and upon the dignity of the position he occupied; that in the instructions to such officers issued by President Cleveland, President Roosevelt and other superior officers, such officials had been directed to avoid scrupulously displays of obtrusive partisanship, and that the influence of Federal officeholders should not be availed of in manipulating political meetings and nominating conventions; that they must not use their office to direct political movements, or neglect their public duties or cause public scandal by their activity; that the Attorney General, by an order addressed to all officers of the Department of Justice, had declared that the spirit of the Civil Service rendered it highly undesirable that Federal employees should take an active part in political conventions or in the direction of other parts of political machinery, etc. (Rec., pp. 60-1).

On further cross-examination, he admitted that he had complained to the Government Printing Office against one William A. Kroll, an employee of that office, because of his activity in the campaign against the defendant; that Kroll had desired defendant to send him to Allegheny County in his interests, which he had declined to do; that, at Kroll's earnest solicitation and importunity, he had made several efforts to secure his promotion or transfer; that, on learning of Kroll's activity for Pearre, he called the attention of the Civil Service Bureau to the case, which fined him two months' pay; that defendant felt badly about this, and went personally to the Commissioners, asking that the fine be remitted, and stated that he had not wished to have him punished in that way, but was unsuccessful, the Commissioners replying that it was a case of persistent violation of the rules of the Service, whereupon on cross-examination, the following occurred:

> "Q. You had not attempted anything at all involving the enlistment of his services in your behalf before you discovered that he was in the camp of the other side?
>
> "Mr. Darlington: That is going into a collateral question, and has no relation whatever to the one question before the jury; that is, the question of damages involved in this case, and whether compensatory or punitive.
>
> "Mr. Davis: I have already notified the court and counsel that this is a preliminary inquiry.
>
> "Mr. Darlington: I insist it is a collateral matter and has already been developed far beyond what would be reasonable and proper."

Whereupon the court, permitting the question to be asked as a preliminary one, the witness answered:

> "I do not remember anything except these conferences" (Rec., pp. 65-6).

Thereupon, upon further cross-examination, and still under the objection that it was a collateral matter, the defendant identified a postal card produced by plaintiff's counsel, sent by defendant and addressed under date of December 27, 1907, requesting Kroll to call to see him; also a letter of similar import of January 17, 1908; that Kroll stated to defendant that he had large acquaintance in Allegheny County, Maryland; that the card and letter introduced had reference to the promotion that Kroll was seeking; that it was absolutely untrue that defendant had promised Kroll that, if the latter would aid his campaign, defendant would see that he did not lose anything, and that he should be protected in so far as the Civil Service rules were concerned, as one of the Commissioners was a friend of defendant, or that he promised Kroll he would see that he got leave of absence from the Government Printing Office, because the acting Public Printer was defendant's friend, etc. (Rec., p. 66).

Thereupon, under the like objection that it "was losing sight of the issue in the case, and was an inquiry into a purely collateral matter," defendant identified, at the request of plaintiff's counsel, who read it in evidence, a circular letter of defendant, sent to Kroll under date of March 31, 1908, to the effect that he would value any support that might be given him at the primary on the following Saturday, etc., the defendant testifying that this was a general circular letter sent out by the thousands, without his knowing who received them, and that the envelope addressing the one to Kroll was in the handwriting of defendant's daughter (Rec., p. 66).

Thereupon the plaintiff called in rebuttal the said William A. Kroll who, over the defendant's objection and exception that the cross-examination of the latter with reference to the witness Kroll was purely upon a collateral mat-

ter, as to which his answers were conclusive, testified that he had never visited the defendant's office before receipt of the postal card above referred to.

Thereupon, plaintiff's counsel announcing that the evidence of the witness Kroll in rebuttal was "distinctly offered for the purpose of contradicting the witness Warner, to show that the visit following the receipt of the postal card was the first time that Kroll had ever called at Mr. Warner's office, and that the defendant had sent for a classified Civil Service employee and solicited his help in a political campaign," the following occurred:

> "Mr. Hogan: Had you ever visited Mr. Warner's office before?
>
> "Mr. Darlington: I object.
>
> "The Witness: I had not.
>
> "The Court: I think he can answer that question.
>
> "Mr. Darlington: I take an exception; my objection is based on the ground already stated that it introduces a contradiction on a collateral matter, which is incompetent."

And the said exception was allowed and duly noted. Thereupon plaintiff's counsel propounded the further question to the witness Kroll:

> "Tell us in substance just exactly what occurred on the occasion of that visit.
>
> "Mr. Darlington: I object.
>
> "The Court: Mr. Darlington, do you object on the ground that it is collateral?
>
> "Mr. Darlington: Yes; that it is a collateral inquiry, leading us into issues not raised by the pleadings and necessarily confusing.
>
> "The Court: The only question is whether it reflects upon the credibility of the witness.
>
> "Mr. Darlington: If it does, the authorities are uni-

form to the effect that a collateral question cannot be gone into for that purpose."

Whereupon, after discussion, the court said:

"The question in my mind is whether this is a collateral question, and I am inclined to think it is not. The gist of this whole controversy now is as to the intent of the defendant in this cause when he wrote this article. That being so, any evidence that reflects upon that intent is admissible evidence, because it goes directly to the point at issue. * * * One of the ways of judging whether an intent is honest or not is whether a man lives up to it. Intent is the question at issue, and if you can show that a man talks one way and acts another, then surely that is admissible evidence to pass *upon the question of the accuracy of what he says, the truth of what he says.* * * * The defendant has given his version of the transaction, the reasons for it. The plaintiff in the case challenges those reasons, and he seems to me to have the right to say to the jury: 'This is the reason stated. We give you acts which we think inconsistent with those statements. It is for you to pass upon the truth of the intent.' I think it is admissible.

"Mr. Darlington: Your honor will allow me an exception upon the ground as stated, and upon the further ground that it is allowing the jury to make inferences upon inferences. First they must assume that Mr. Warner is not consistent in his attitude in criticising Mr. Baker about the Civil Service; and, second, they must infer from that inference that he had some other motive," *i. e.*, some other motive for the publication in suit that that to which he had testified.

Thereupon, and subject to the defendant's exception to each of the answers given, the witness Kroll testified that he called at the office of the defendant; that the latter pro-

posed that the witness should assist him in Montgomery County and work on his behalf; that he would see that witness did not lose anything; that, so far as the Civil Service was concerned, he would see that he was protected, one of the Commissioners being his personal friend, and that he would see that he got leave of absence from the Printing Office, the Deputy Printer, also, being defendant's personal friend, and, on cross-examination, that he was never in his life with the defendant at the office of Mr. Esterly, the Auditor for the State, and other departments; that he had been to that office, but had gone alone, and that he was not there in September, 1907 (Rec., pp. 68-71).

The defendant, in surrebuttal, testified that he had gone with witness to the office of Esterly, and that, on the day they did so, he had met Kroll at defendant's office. Mr. Esterly, also, testified that there was a vacant clerkship in his office, in connection with which Kroll called to see him in October or November, 1907, and that it was witness' recollection that the defendant accompanied or introduced Kroll on that occasion (Rec., pp. 71-2).

At the conclusion of the testimony, the defendant moved the court to direct a verdict for him on the ground more fully set forth at page 72 of the Record (*supra*, p. 4), that neither the inducement nor the colloquium of the declaration set forth a cause of action, the essential averments to such a cause being left entirely to the innuendo, which was not the subject of proof, is not traversable, and is incapable of comprising or eking out the cause of action; but the court, after argument, declined to grant the motion and overruled the same, to which action exception was duly noted (Rec., p. 72).

Thereupon the court granted the four instructions asked by the plaintiff, set out at pp. 72-5 of the record, each of which was duly excepted to, and denied the four instruc-

tions asked by the defendant, set forth at pp. 75-6 of the record, subject to exceptions to each of these rulings, severally and duly noted.

In the argument to the jury, counsel for the defendant called attention to the fact that, according to his testimony, he had had no idea until March 31st that his publication of March 28th was open to the libelous construction subsequently put upon it, and that in the article which appeared on the morning of March 30th, introduced in evidence by the plaintiff, he had said, after again referring to the Rockville conference: "Why not stay at home and try to close the Race-Track Scandal," thus showing what he had in mind by the previous article. Whereupon, in the closing arugment of counsel for plaintiff, and referring to the article of March 30th, the following occurred:

> "Mr. Davis: The inquiry of this publication was, 'why not stay at home and prosecute the race-track scandal?' 'why not stay at home and close the race-track scandal?' That is what the article says and that is why we put it in. Why not stay at home and try to close the race-track scandal? namely, *the scandal I exposed in the article of March 28th.*
>
> "Mr. Darlington: I object. The court, on objection of Mr. Davis, refused to allow Mr. Warner to explain what he meant by this article of March 30th. Mr. Davis objected that the article was not libelous, and the court excluded the explanation on that ground. Counsel is now arguing that the article was libelous.
>
> "Mr. Davis: My distinguished friend argued, before recess, that the meaning of this article should be considered by the jury as shedding light upon the meaning to be given to the former article, and was in line with his construction and with his declared reason for publishing it. I say that the words he spoke here 'why not stay at home and close the race-track scandal' are not words that express the meaning of the

article in the issue of the Washington *Herald* of March 30th, and I say that I have the right to say to the jury that in using the expression 'why not stay at home and close the race-track scandal' he could not have had it in mind to give any such meaning to the article of the 28th as is now insisted upon as a defence against punitive damages in this case.

"Mr. Darlington: Counsel has said, in substance, that these words mean, 'Why not close the race-track scandal?' We offered to explain that, and on the objection of counsel we were not allowed to do it, on the ground that it is not libelous. I submit that the remark should be stricken out and the jury instructed to disregard it.

"Mr. Davis: I submit that, as counsel undertook to give a meaning to those words when he was on his feet, which he said was in support of the defendant's testimony as to his meaning and intent in that article of the 28th, I have a right to say that it does not bear that meaning and it cannot bear that meaning.

"Mr. Darlington: A non-libelous meaning?

"Mr. Davis: I take the judgment of the court, however.

"The Court: I think that inasmuch as Mr. Darlington gave the article a meaning in connection with the intent of the defendant in this case, taking the words of the article itself, that the plaintiff would be justified in undertaking to give his version of it, and let the jury decide which is the meaning it properly bears.

"Mr. Darlington: Although he is now arguing that they are libelous? Although on objection he argued they were not libelous, and on that ground explanation was excluded, he is now allowed to argue that they are libelous?

"The Court: I do not think they are libelous. I do not know that he can argue that they are libelous.

"Mr. Darlington: That is why I am objecting to his putting a construction upon them which makes them libelous.

"The Court: They might only be libelous under certain conditions, and not libelous from the words themselves. He is taking the words and says to the jury that they do not bear the meaning that you gave them.

"Mr. Darlington: But do mean—

"The Court: But do mean this, which he applies to the testimony in the case. If it is fair for one it is fair for the other. He cannot say that they are libelous, and the jury would not be entitled to bring that in as an additional liability; but as you have already commented upon the article in reference to the testimony in the case, and the intent of the defendant in this case, surely it is but fair that the other side should then have the right to say that they cannot bear that meaning, and to criticize the intent.

"Mr. Darlington: To make my point plain—my point is this: That we, having been refused the privilege of explaining what is meant by that article, and the intent and meaning of it, on the plaintiff's own objection, and the court having sustained the objection on the ground that this article is not libelous, the fact that I argued the meaning of that article upon its non-libelous construction and intent does not give the plaintiff the right at this point to argue that it has a meaning which is corroborative of his construction.

"The Court: I think Mr. Davis is entitled to make the comment on the meaning of the article.

"Mr. Darlington: That he is entitled to make the comment he has made?

"The Court: Not as a part of the libel in suit, but as relating to the intent with which the paper was published and the action of the defendant in publishing it. I overrule your objection.

"Mr. Darlington: I have my exception?

"The Court: Yes." (Rec., pp. 78-9).

ASSIGNMENTS OF ERROR.

The trial court erred, it was contended on behalf of the defendant in the Court of Appeals, in the following particulars:

I. In denying the motion to direct a verdict for the appellant.

II. In denying the appellant's motion in arrest of judgment.

III. In excluding testimony as to the length of time necessary to determine a test case in the Court of Appeals.

IV. In excluding the newspaper publications, and each of them, set forth at pages 50-55 of the record.

V. In excluding testimony that the appellant had read each of the said newspaper publications prior to the publication of the article in suit.

VI. In excluding evidence for the defendant, of the nonuse by him of whiskey in support of his candidacy.

VII. In excluding evidence that, at the time of the Rockville meeting, the sale of whiskey in Montgomery County was prohibited by law.

VIII. In refusing to permit defendant to testify as to his intent in publishing the article of March 30th and the meaning intended by him in said publication.

IX. In permitting the cross-examination of the defendant as to the transactions between himself and the witness Kroll.

X. In admitting the testimony of the witness Kroll as to his communications and transactions with the defendant.

XI. In granting the appellee's first instruction to the jury.

XII. In granting the plaintiff's second instruction to the jury.

XIII. In granting the plaintiff's third instruction to the jury.

XIV. In granting the plaintiff's fourth instruction to the jury.

XV. In refusing the defendant's second requested instruction to the jury.

XVI. In refusing the defendant's third requested instruction to the jury.

XVII. In refusing the defendant's fourth requested instruction to the jury.

XVIII. In overruling the defendant's objection to the remarks in the closing argument of appellee's counsel, as to the meaning of the publication of March 30th.

If these objections, or any of them, were well taken, the court below was right in reversing the judgment of the trial court.

I-II.

The grounds of the motion to direct a verdict for the defendant and of the motion in arrest of judgment are set out at pages 72 and 10 of the Record. These grounds are, in brief, that the *inducement* and *colloquium*, which are the only parts of the declaration which can be looked to for that purpose, contain no allegations upon which a verdict or judgment in favor of the plaintiff can be recovered or sustained, and state no cause of action against him.

That the *innuendo* is explanatory, only, of the words to which it is attached; that it cannot enlarge or restrict the natural meaning of those words, introduce new matter, or make certain that which is uncertain except in so far as it connects the words published with the extrinsic or explanatory circumstances *alleged in the inducement;* that it raises, in no case, any question of fact, but only one of logic; that it presents the inquiry, only, whether the explanation it gives is a legitimate conclusion from the terms set out in the *inducement* and *colloquium*, the determination of which inquiry is in all cases the exclusive province of the court, are elementary. (25 Cyc., 449-50; 13 Encl. Pl. & Pr., 54-5, and cases cited.) And that they were familiar to plaintiff is evident from their objection to the amended plea offered by counsel for the defendant, namely, that it "was a plea to the innuendo." (Rec., 55.)

The use of the inducement, or averment, "is to ascertain *that* to the court which is generally or doubtfully expressed, so that the court may not be perplexed *of whom*, or *of what*, it ought to be understood, and to add matter to the plea to make doubtful things clear. The colloquium serves to show that the words were spoken in reference to the matter of the averment. The innuendo is explanatory of the subject-matter *sufficiently expressed before;* and it is explanatory of such matter only, for it cannot extend the sense of the words beyond their known meaning, *unless something is put upon the record for it to explain.*" Van Vechten v. Hopkins, 5 Johns. 211, 220.

In other words, in order, in the case at bar, to set out a cause of action, the inducement and colloquium must have ascertained to the court that the words were published or ought to be understood of the plaintiff's non-prosecution of the race-track gamblers, or of the alleged illegal obtaining of money by the plaintiff from the race-track, the Jockey Club or the bookmakers, or with reference to the performance or non-performance by him of his official duty, or with reference to gambling at the race-track, etc., as to all which matters the inducement and colloquium are wholly silent, leaving them to be found in the innuendo, only.

> "The question which an *innuendo* raises is, in all cases, a question, not of fact, but of logic. It is, simply, whether the explanation given is a *legitimate conclusion from the words stated*, and the determination of this question must, in all cases, be the exclusive province of the court." Fry v. Bennett, 5 Sandf., 65.

The innuendo is only "explanatory of some matter already expressed: it serves *to point out*, where there is precedent matter, but never for a new charge: it may *apply* what is *already expressed*, but cannot add to or enlarge

or change the sense of the previous words." Thus, where the declaration charged that the slander was "He has forsworn himself (meaning that the plaintiff had committed wilful and corrupt perjury);" it was held that, there being no inducement or previous or other statement that the words related to false swearing in a judicial proceeding, the declaration was bad on motion in arrest, "for innuendo cannot extend their meaning." 1st Chit. Pl., 406-7.

And this is true, even though some of the counts were good, if the verdict is general. Posnett v. Marble, 62 Vt., 481.

> "Nothing, therefore, which must be proved, can be set forth in the innuendo." Barnes v. State, 88 Md., 354.
>
> "An innuendo cannot vary, enlarge or extend the natural and obvious meaning of words."
>
> "An innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. * * * An innuendo cannot alter, enlarge or extend their natural and obvious meaning, but only explain something *already sufficiently averred*, or make a more specific application of that which might otherwise be considered ambiguous, *to the material subject-matter properly on record by way of averments or colloquium*." Pollard v. Lyon, 91 U. S., 225, 233-4.
>
> "An innuendo cannot be proved; it is for the judge to decide whether a publication is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed to it." Gaither v. Advertising Co., 122 Ala., 458, and citations.

Since the inducement and colloquium must state the cause of action, without the aid of the innuendo, there results, as the necessary test (Fry v. Bennett, 5 Sandf. 65)

the inquiry, Strike out the innuendo, and does a cause of action remain?

Applying this test, which is the inevitable result of the authorities cited, to the case at bar, and striking out the innuendos accordingly, we have no allegation left that the words complained of were written or published with reference to any illegal or improper obtaining of money, whether from the race-track, the Jockey Club, the bookmakers, or elsewhere, nor any reference to the obtaining of money by the plaintiff, or to the performance or non-performance by him of any duty, official or otherwise, whatsoever. As stated in support of the motion to direct a verdict for the defendant (Rec., p. 72), there is no allegation that any of the persons interested in gambling at the race-track were sources from which the plaintiff, by reason of his official position or otherwise, might unlawfully or improperly obtain money, or that the words were written or published with reference to the illegal or improper obtaining of money from those persons, or with reference to their non-prosecution, or to the non-performance of any other official duty of the plaintiff, or with reference to the obtaining of money by him at all, whether from the Jockey Club, the race-track of that Club, or from any race-track, or from any persons or sources whatsoever, all of which defects were specifically pointed out in support of the motion in arrest (Rec., p. 10).

The averment alleges, it is true, that the defendant "maliciously contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney for the District of Columbia," composed and published the alleged libel of and concerning the said plaintiff, and of and concerning the said office of the plaintiff," etc.; but this is very far from alleging any one of

the several matters above set forth, or raising the logical question which it is the sole function of the innuendo to present for determination by the court, namely: whether unalleged efforts of the plaintiff to raise money from the race-track people, or the unalleged non-prosecution of them for race-track gambling, or the unalleged non-performance by him of any other duty, official or otherwise, is a "legitimate conclusion from the premises stated."

> "Where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct by him in that character." Van Tassell v. Capron, 1 Denio., 250, 252 and citations.

Nothing of the sort is to be found in the declaration in the present case outside of the innuendo, which, under all the authorities, cannot be looked to for the purpose of aiding or eking out the statement of the cause of action.

In Grand v. Dreyfus, 122 Cal., 58, the allegations were, "If he (meaning the plaintiff) continues to sell (meaning to steal) my hogs, I will send him (meaning the plaintiff) where he was another time (meaning the State's Prison of the State of California)." Held, that, without a colloquium stating sufficient facts to justify the innuendo, the word "sell" could not be construed as meaning "steal," or the words "where he was another time" as meaning State's Prison.

So in Bloss v. Tobey, 2 Pick., 320, which arose on motion to arrest, the allegation was that, maliciously intending to hurt plaintiff and expose him to the penalties of the malicious burning of private dwellings, the defendant said of and concerning the plaintiff and of and concerning a cer-

tain store of the plaintiff's at Alford, which had been consumed by fire, "*He* (meaning the plaintiff) *burnt it* (meaning the plaintiff's store in Alford, aforesaid) *himself* (again meaning the plaintiff), and further meaning and insinuating by the words aforesaid that the plaintiff had been guilty of criminally and maliciously and wilfully burning his own store in Alford, aforesaid." The words charged in the second count were, "*There is no doubt in my mind* (meaning the mind of the said Tobey) *that he* (meaning the plaintiff), *burnt it* (meaning plaintiff's store, aforesaid) *himself* (again meaning the plaintiff). *He* (meaning the plaintiff) *would not have got his goods insured* (meaning certain goods of the plaintiff which he had previously procured to be insured and were largely in said store) *if he* (again meaning plaintiff) *had not meant to burn it* (again meaning the said store of the plaintiff), and further meaning and insinuating by the said last mentioned words, that the plaintiff had wilfully and maliciously, and for the purpose of defrauding the insurers of said goods, burnt his own store, aforesaid)." Held, by Parker, C. J., that the judgment must be arrested for want of a sufficient count to support the verdict; that the burning of plaintiff's own store was not actionable, if unaccompanied by an injury to or design to injure some other person; that the colloquium or averment should have set out the circumstances which would render the burning unlawful, and the plaintiff then should have averred that the words were spoken of and concerning these circumstances; and that, as to the second count, in the absence of any colloquium relative to goods in the store which had been insured, that matter was not properly to be alleged by an innuendo, "the office or use of which, according to all the authorities, is not to enlarge or add anything to, but to make more clear by explanation, the sense of words sufficiently averred to have been spoken."

See, to like effect, the able consideration of the question by Shaw, C. J., in Carter v. Andrews, 16 Pick., 1. Also Goldstein v. Foss, 2 Younge & Jervis, 146; Dodge v. Lacey, 2 Ind., 212; Hays v. Mitchell, 7 Blackf., 117; Edgerly v. Swain, 32 N. H., 478; Bowdish v. Peckham, 10 Chipm., 144; Merritt v. Dearth, 48 Vt., 65; Sayre v. Jewett, 12 Wend., 135; Dyer v. Morris, 4 Mo., 214.

So in Posnett v. Marble, 62 Vt., 481, 491, in which case the defendant had made certain answers to a postoffice inspector, inquiring as to the character of the plaintiff, who was an applicant for the position of postmistress. The second count charged the words, "My mail won't come into a wh're house." The court said: "The defamatory words have no apparent connection with the plaintiff and her affairs, and their application must fully appear from the averment and the colloquium. It is averred that the plaintiff was an applicant for the position of postmistress, and that the defendant spoke the words of and concerning the plaintiff to prevent her from obtaining such employment. With them there should have been, also, an averment that the plaintiff had a house, and the colloquium should have been framed to include it." In the case at bar, there was nothing in the averment or colloquium to indicate, however remotely, that the words published had any reference to the non-prosecution of the bookmakers, or to the illegal or improper obtaining of money from them by reason or means of such non-prosecution, or to the non-performance of any duty by the plaintiff, or the like.

In Peterson v. Sentman, 37 Md., 140, the words charged were, "You" (meaning the plaintiff) "are a bad woman, and keep a bad house, and I can prove it" (meaning thereby that plaintiff was not a chaste woman, was a wh're and kept a common bawdy house; and "she" meaning the plaintiff, "was a ornary" meaning ordinary, "wh're and kept a

ornary house for ornary men to go to" meaning thereby that she kept a bawdy house. The court, citing Van Vechten vs. Hopkins, 5 Johns, R., 211, and its citations, said: "There is an averment that the plaintiff is a housekeeper, but it is nowhere alleged by way of colloquium that the house in which she lived, or its character, as kept by her, was the subject of conversation, or the particular object referred to by the defendant when he used the terms 'bad house' and 'ornary house' "; and, after citing Snell v. Snow, 13 Metc., 278, and Dodge v. Lacey, 2 Cart. Reps., 213, in which the declarations were held defective on the ground that there was no sufficient colloquium to justify the innuendo, the court concludes: "Authorities upon this point could be cited to a very large number, but it is unnecessary, *because they all concur in the inflexible rule that words that are not actionable ex vi termini cannot be made so by an innuendo, but must be charged by proper averments and colloquium*, which will warrant the explanatory meaning given them by the innuendo. The rule may be a strictly technical one, and may operate harshly in its application in this case, but it is too firmly established to be departed from. And, under it, we hold it to be clear that there is no sufficient allegation in the declaration before us, requiring the defendant to answer to the charge of having stated of the plaintiff that she kept a bawdy house."

So, in the case at bar, it is equally clear that there is no sufficient allegation in the declaration before the court requiring the defendant to answer to the charge of publishing of the plaintiff that he was obtaining money from the Jockey Club, or others, in consideration of his omission to indict or prosecute them, or that he was being influenced in the discharge of his duties as United States District Attorney by the fact that persons interested in the race-track, or in gambling there, were contributing money for use

against the candidacy of the defendant, or that he was guilty of corruption or any misconduct in his office of United States District Attorney.

McCuen v. Ludlum, 17 N. J. Law., 12, was an action of slander, for speaking the following words: "He (meaning the plaintiff) has broken open my letters in the post-office, (meaning that the plaintiff had been and was guilty of breaking open sealed letters addressed to the defendant, and which came to the hands of the plaintiff as postmaster.)" Demurrer sustained. An Act of Congress provided that, "if any person employed in any capacity by the Post-office Department shall unlawfully delay, detain, or open any letter, etc., he shall for every such offense be fined, etc."

> Hornblower, Ch. J.: "The question comes then to this, do the words laid, in their usual and common acceptation, import that he, *unlawfully*, and in violation of official duty broke open the defendant's letters. I think they do not. I think the court cannot judicially understand them so, except by an inference not warranted *by any averment in the declaration.* If there had been a colloquium of and concerning the malconduct of the plaintiff in the execution of his office, or of and concerning his *unlawfully* breaking open the defendant's letters; then I admit that the words spoken by the defendant might, by a proper innuendo, be made to appear, on the record, to mean that the plaintiff had *unlawfully* broken open the letters. The innuendo in this declaration does not indeed attempt to make the words mean an *unlawful* breaking open of the letters; it merely says 'Meaning that the plaintiff had been guilty of breaking open, etc.' *But if it had been,* 'Meaning that the plaintiff had *unlawfully* broken open, etc.' *it could not have helped the plaintiff in this case.* The office of an innuendo is often mistaken by pleaders. It cannot extend the sense of the words spoken beyond their natural meaning, *unless*

something is put upon the record to *which the words spoken may be referred,* and *by which they may be explained by the innuendo.* * * * If the words as laid amounted to a charge that the plaintiff had violated his official duties, I think upon the authority of How v. Prinn, Salk., 694, and of what was said by the court in Onslow v. Horne, 3 Wills, 177, 196, and other cases, they would be actionable."

In this same case, Dayton, J., also said:

"It is true that many words which are not slanderous when applied to private persons become so when applied to them in their official character, but then the words must impute a defect of understanding, abili'y, or integrity, to make them so (citations)."

Greenwood v. Cobbey, 26 Neb., 449:

"He is unfit to hold the office of city attorney; his opinion is too easily warped for a money consideration." (Statement by mayor to council.)

"But the words themselves are not actionable. A thoroughly capable and conscientious lawyer who is generally successful with his cases, may by reason of interest, connection, or inclination, be unfit for a city attorney and it need not be any disparagement of his general character. So in regard to the alleged charge that his opinion is too easily warped, etc. This is not necessarily a charge of bribery or dishonesty; and there is no statement in the petition that such a charge was intended. A court cannot extend the meaning of words beyond their plain import."

Where the words were, "You have robbed me of one shilling tan money," as the word "rob" does not necessarily import a felony, an innuendo to that intent, without

any inducement or prefatory allegation of the defendant having used the words in a felonious sense, is defective and bad on a writ of error, even after judgment for plaintiff on a verdict of a jury. 1 Chitt. Pl., 400, 401, citing Day v. Robinson, 1 Adol. & Ellis, 554.

The objection now under consideration was raised by motion at the trial, when, under the rules of the trial court, it might have been obviated by amendment, but the plaintiff elected to stand upon his declaration, without curing it. It was raised again by motion in arrest, as is held proper in 1 Chitt. Pl., 406-7, and was the practice pursued in Bloss v. Tobey, 2 Pick., 220; Posnett v. Marble, 62 Vt., 481; Carter v. Andrews (16 Pick, see p. 8); Goldstein v. Foss, 2 Y. & J., 146; Atkinson v. Scammon, 22 N. H., 40; Bowdish v. Peckham, 10 Chipm., 144; Ryan v. Madden, 12 Vt., 8; Merritt v. Dearth, 48 Vt., 65; Sayre v. Jewett, 12 Wend., 135, and perhaps a majority of the other cases cited *supra*. Cases of libel and slander have been cited in this brief, indiscriminately, the rules of pleading in these actions being the same. Bowdish v. Peckham, *supra*.

The objection, namely, that the declaration is insufficient to state a cause of action, would have been good if made, in the first instance, in the Appellate Court. Slocum v. Pomeroy, 6 Cranch., 221, 225; Bank v. Smith, 11 Wheat., 171; Cragin v. Lovell, 109 U. S., 194, 199.

The primary, pivotal question in this case, therefore, is whether the Court of Appeals erred upon a question of pleading, and upon which question it followed the general, it is believed the uniform current of authorities, including the decisions in Maryland, from which State our practice in the District of Columbia is derived.

If the court shall concur with counsel for the defendant that the objections to the declaration were well taken, under the inflexible current of authority relating to them, examination of the remaining objections to the judgment rendered by the trial court in favor of the plaintiff becomes superfluous. They will, for the most part at least, be considered more briefly.

III.

For the purpose, apparently, of showing that his diligence in the race-track prosecutions had been such as to preclude the theory of fair comment, in good faith, upon his conduct in that regard, the plaintiff, both in his pleadings and in his evidence in chief, detailed at much length his diligence in that respect, the defendant, on the contrary contending that, as he believed, due diligence had not been exercised in the efforts to enforce the law against bookmaking at the race-track, and that it was to the plaintiff's inactivity in that regard, while occupying his time in Maryland politics, that the paragraph of the publication "How about the race-track?" was intended to apply. The evidence developed the fact that, although Davis was convicted in November, 1906, under the same state of facts on which Klein had been acquitted, and that the bookmakers had, nevertheless, continued their activities, with the exception that they "walked around" in the grand stand instead of remaining stationary at their stools at the Spring Meet of 1907 and at the Fall Meet of that year, without interference or further attempted prosecution, and that it was only in January, 1908, or about sixty days before the Spring Meet of 1908, that Walters was indicted, for the purpose as it was claimed of making still another "test case." We submit that, upon the question whether this was due dili-

gence, at least to the extent of excluding the claim of fair comment, the defendant was entitled, upon cross-examination of one of the very witnesses by whom the alleged diligence was attempted to be proven, to show the impossibility of getting a determination of the question by the Appellate Court to which the belated appeal was taken, whose decision alone could determine the test, before the Spring Meet of 1908, and the entire feasibility of having obtained it if the bookmakers had been proceeded against in the Spring of 1907, when they first began their attempted evasion of the law as established by the Davis decision, and that the defendant's exception at p. 38 of the Record, was accordingly well taken.

IV.

The trial court erred in excluding, severally, the newspaper publications, at pages 50-5 of the record.

> "It is, of course, open to the defendant to go to the jury upon the theory that the words, if ambiguous, were not used in a defamatory or libelous sense, and that, *under the circumstances attending the publication*, its readers could not reasonably have so understood them, but the issue thus raised is one of fact, and not one of law." Morse v. Printing Co., 124 Iowa, 707, 714.
>
> "The question is, how would ordinary men naturally understand the language used? It is the sense in which the reader, *familiar with the explanatory circumstances, known to both writer and reader* would naturally understand the matter, which is controlling. * * * Where the language used has reference to, or is connected with, any other thing or event which affects its meaning, it must be construed in relation to such thing or event." Sheibley v. Washington, 130 Iowa, 195, 200-1.

"It is also settled by our adjudications *that the surrounding circumstances may be shown, and the occasion in which the words are used put before the jury,* for the purpose of showing that the words could not have been understood as imputing a crime." Line v. Spies, 192 Mich., 484.

"The principle that the decisions recognize clearly shows that the court should have permitted the defendant *to prove the facts and circumstances in reference to which the words were used;* for these facts and circumstances may take from the words their slanderous import, and show that no crime in fact was imputed, although every circumstance to which the words related was there." Williams v. Cawley, 18 Ala., 206-9.

"In passing upon the sufficiency of such language as constituting a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and proper construction." Bettner v. Holt, 70 Cal., 270, 274-5.

In Rex v. Horne, Cowp., 622, 627, which was an indictment for libel in publishing on June 8, 1775, "of and concerning His Majesty's government and the employment of his troops," that the Americans who had fallen at Lexington and Concord, "preferring death to slavery, were, for that reason only, inhumanly murdered by the King's troops," Lord Mansfield held admissible in defense a copy of the *Public Advertiser* of May 31, 1775, containing an account of the engagements at Lexington and Concord, as showing "that at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question."

"For the purpose of its construction, language is to be regarded, not merely with reference to the words employed, but according to the sense or meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published. The language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at with the help of the cause and occasion of its publication. *The court or the jury is to place itself in the situation of the hearer or reader,* and determine the sense or meaning of the language in question according to its natural and proper construction." Townshend on Libel and Slander, Sec. 133.

In Pfister v. Press Co., 121 N. W., (Wisc.), 938, 945, in a case quite similar to the present in essential particulars, the defendant had offered to show that the matter of the alleged libel had been the subject of public investigation, had occupied a large amount of space in the newspapers at the time, and had been a matter of general public discussion. *Held*, That, if this were the case, the newspaper articles tendered under the offer should have been admitted; but the judgment was affirmed upon the ground that the articles, upon examination, failed to support the tender.

See also, McCormack v. Sweeney, 40 N. E. R., 114; Taylor v. Bond, 88 N. E. R., 311.

All the circumstances of the publication must be considered, and that meaning taken which will give it, in the light of the circumstances, what it fairly may be presumed to have conveyed to those to whom it was published. Berea College, 77 S. W., 381.

To apply these principles to the question under consideration:

The publication in controversy consisted of several terse, separate, distinct paragraphs.

The first referred to a public address of Mr. Pearre, which the article held up as unstatesmanlike, and undignified.

The second referred to the action of a Justice of the Supreme Court of the District, who, with the plaintiff, went to Rockville to attend a county political conference, "and determine what ammunition was needed to defeat him," *i. e.*, the defendant, which action was described as being still more undignified.

The third paragraph inquires, "Where does the money come from in the contest against Mr. Warner?"—accompanied by testimony in the cause, without attempt at contradiction, that this county political convention included postmasters, departmental employees, and other persons in the Classified Civil Service, and the point of the reference, according to the testimony of the defendant, being whether the money was being contributed by these employees, contrary to the Civil Service laws, or by Mr. Pearre or Mr. Blair.

The fourth and concluding inquiry, in a separate and distinct paragraph, was, "How about the race-track?" Taken solely in connection with the context of the article, it might perhaps convey to some minds, unfamiliar with the widely advertised and known conditions under which they were published, the construction placed upon it by the court as the only one of which it was susceptible, namely, an inquiry whether the money in the contest against Mr. Warner had come from the race-track. So confined and limited, the tendency was to negative the contention testified to by the defendant that he had no idea or thought of charging the plaintiff with taking money from the race-track for political or campaign purposes, but had reference solely to the race-track question, with which the air was then filled.

It is obvious, we submit, both from the principles above cited and upon common reason, that, if the issues of the very paper in which appellant's publication appeared had been for days teeming with similar inquiries and comments, directed against the non-action of the plaintiff in his capacity as United States Attorney, it would be very unfair and unreasonable to construe the plaintiff's publication as an isolated paper, wholly disconnected from the general public comment and criticism of which it formed but a part. Taken alone, as the ruling of the court compelled the jury to take it, the paragraph in question apparently had nothing to which it could relate except the preceding inquiry, "Where does the money come from in the contest against Mr. Warner?" Taken in connection with the general public and newspaper series of inquiries and criticisms, in the light of which it was published, it might at least reasonably bear the construction contended for by the appellant, or, in any event, have been believed by the jury to have been so intended in accordance with the defendant's sworn testimony in that regard—in the former view, tending to exonerate him altogether, and in the latter, at least to relieve him of punitive or compensatory damages.

It remains to be seen how far these contemporaneous publications were in line with the defendant's testimony, and gave support to his claims as to the conditions under which, and the purpose for which, the paragraph in question was published.

The extracts offered were taken entirely from the Washington *Herald*, the same paper in which the publication appeared, and which, therefore, if admitted in evidence, would have placed the jury in the position of the readers of the article of March 28th. In the economy of space, only a few of these publications will be here quoted. The speci-

men extracts offered will be found in the record, at pp. 50-55.

The record shows that the press of the city was practically unanimous in its attitude upon this subject. The citations offered were from the *Herald*, only, as being more germane for present purposes, and, these articles being excluded, it was deemed unnecessary to add those from other papers.

March 7th:

> "What is going to be done about it? What are the authorities doing, or going to do? Is this Spring Meet, now scheduled, with its attendant evils, to be permitted? Is Washington, the Capital of the Nation, again to give itself over to an orgy of gambling and disgrace itself anew?"

March 10th:

> "The United States District Attorney thinks it is useless to prosecute under the present inadequate law, and so advises the Major and Superintendent of Police not to make any more arrests. And yet, at the Autumn Meeting at Bennings last year, the United States District Attorney asked Major Sylvester to send a number of officers out to the track to watch gambling. * * * It is precisely at this point—at the office of the United States District Attorney—that the movement to wipe away the disgrace of public gambling from the National Capital, is blocked."

From Commissioner West:

> "In view of the statement of the United States District Attorney for the District of Columbia as to the bookmakers at the Bennings track, I am of the opin-

ion that the present law, as indicated by the Court of Appeals, would justify criminal proceedings against them."

From Commissioner Macfarland:

"Now, all that the District Government can do is to make arrests through its Police Department. It cannot prosecute the offenders. The only officer who can do that is the United States District Attorney, who is the representative of the National Government, and not of the District Government, and who is not in any way under the authority of the District Commissioners. Arrests without prosecution are ineffective."

From the Superintendent of Police:

"There is no use in making arrests if the District Attorney declines to prosecute; in fact, after one man had been arrested for bookmaking, I was instructed to make no more arrests until this one—a test case—had been decided."

Editorial, March 10th:

"Gambling at the Bennings Race-Track can be stopped if the authorities of the District of Columbia resolve to stop it. District Attorney Baker can stop it by prosecuting the gamblers vigorously, persistently and relentlessly."

March 11th:

"'It is evident that Commissioners Macfarland and West and Police Superintendent Sylvester believe that all that is needed to stop the public gambling at Bennings—to wipe out the evil altogether—is the active aid and co-operation of the District Attorney's office."

March 12th:

"It is thought Mr. Baker will become alive to the crying demand of the people of Washington to appear at once before the three Justices constituting the Court of Appeals of the District of Columbia, and request that the cases of William Davis and John Walters be specially set for argument."

Editorial, March 12th:

"There are some very significant observations in Justice Stafford's opinion concerning the insufficiency of the indictments brought in the Walters case. It may be possible so to frame an indictment as to pass muster in the courts, if it be shown with sufficient clearness that bookmaking has been 'set up' on the Bennings track."

March 23d:

"The business at Bennings is gambling—plain, vulgar, unvarnished, commonplace, criminal gambling. 'Improving the breed of horses' is the euphemism for dwarfing and damning the breed of men. Round and round the horses go, and out of the hopper of the swift machine come the blunted moral sense, the dissolute life, the defaulter, the thief, the suicide, the murderer, the ruined men, the beggared women, the wretched little children."

Editorial, March 23d:

"The shame-faced authorities watch the demoralizing proceeding, confessedly helpless and impotent."

Editorial, March 25th:

> "Commissioner West said: 'The effort to secure warrants for the arrest of bookmakers at the Bennings race-track signally failed. Upon complete information of bets made at the race track, the District Attorney informed Major Sylvester that the actions brought to his attention did not constitute any violation of law.'"

March 25th. Commissioner Macfarland:

> "If I could have had my way, the gamblers would have been raided by the police in force every day. As it is, cases have been made by the Police Department, which have submitted the evidence to the United States District Attorney, who has declined to prosecute."

In the issue of March 28th, the very issue containing the publication complained of, and which was offered by plaintiff's counsel with the distinct statement that the whole paper, everything in the issue that related to the race-track, would go in (Rec., p. 14), contained an article, which the court nevertheless excluded on objection by the very counsel who had offered the whole issue, and which article will be found at pages 54-5 of the record, ironically offering congratulations to the plaintiff and to other officials, "for their brave, manly and unyielding stand against the betting evil in the District of Columbia." "It is due almost entirely—nay quite—to the efforts of these able servants of the public—these men who never dodge or shirk, but ever fight for the right—that the rapacious bookmakers, black-legs and gamblers no longer prey upon the public," etc.

If, in the language of the decisions above cited, it is the sense in which the reader, *familiar with the explanatory circumstances, known to both writer and reader*, would natu-

rally understand the matter, which is controlling, etc., we submit that this "setting," in which the appellant's article was written and published, was proper to go to the jury, and that its exclusion, even when offered for the purpose, merely, of lending support to his sworn testimony as to his intent, and, consequently, as bearing upon the question of compensatory or punitive damages, was material and hurtful error.

V.

The fifth exception to the rulings of the trial court was to its action in excluding testimony that the defendant had read each of the newspaper publications last above referred to, prior to the publication of the article in suit; that none of them had been contradicted, refuted or denied in any way; that he had reason to believe, and did believe, that they were true, and that it was in this condition of this public question in the community that the article in question was written and the words, "How about the race-track?" used, to indicate a comment upon or criticism of the action of the District Attorney in leaving the race-track unattended to, while engaging in local politics in Maryland. The considerations presented with the preceding exceptions to the rulings of the trial court are applicable here, without repetition.

The plaintiff having given testimony, at page 25, tending to prove that, at the Rockville conference, it was stated that the defendant was using money and whiskey in his campaign, and that it would take something to overcome that, the latter, under his exception, was not permitted to testify that he had expressly prohibited the use of whiskey in his campaign, and that none was furnished in support of his candidacy, either with his approval or to his knowledge;—with the result that he was compelled to give his

case to the jury with the evidence of his reputed use of whiskey in the campaign, for which use he was criticising the plaintiff, and with no opportunity to vindicate himself from the apparent resulting inconsistency. See the trial court, *supra*, p. 30.

As will there be seen, in connection with the Kroll testimony, the court permitted the introduction at the trial of collateral issues as to whether the defendant, claiming to be opposed to violation of the Civil Service laws, had sought the aid of a Civil Service employee in support of his own candidacy, on the ground that this affected his credibility, and on the further ground that, if the jury should find, upon the conflicting testimony upon this issue, that the defendant was criticising the plaintiff for violation of the Civil Service law and at the same time was endeavoring to have that law violated in the interests of his own candidacy, the jury might properly discredit his testimony as to the intent with which he had written and published the article in controversy. (See Rec., p. 60.) Here he was placed in a similar position of inconsistency, and not allowed to offer any testimony in conflict with it.

VII

The seventh exception was to the exclusion of evidence that, at the time of the Rockville meeting, at which, according to defendant's testimony, not categorically or very seriously denied in the testimony of the plaintiff, the use of money and of whiskey to defeat appellant was being discussed, the county was what is known as a dry or prohibition county.

The ground of the exception to this ruling of the court is sufficiently set out at page 50 of the record.

VIII.

The eighth exception can be more briefly and conveniently discussed with the eighteenth or final assignment, and will, accordingly, be considered in that connection.

IX-X.

These exceptions relate to certain collateral issues introduced over objection, and subject to exception, in connection with the cross-examination of the defendant in regard to his correspondence and transactions with one William A. Kroll, and the admission of the testimony of the said Kroll, over like objection and exception, in contradiction of the defendant in regard to these collateral transactions. The facts are stated, *supra*, at pages 25-30. (See record, pp. 65-7, 68, 71, 72.)

The defendant had testified that he considered plaintiff's participation in the Rockville meeting as in violation of both the spirit and the letter of the Civil Service law, and, therefore, properly subject to comment. Being interrogated on cross-examination, as to certain communications addressed by him to the Attorney General of the United States upon the subject, with a view to showing malice and a desire to deprive the plaintiff of his office, he denied that he had had any such purpose, or that his letters to the Attorney General, introduced in evidence, showed anything more than a desire to have the activities of the latter in the campaign, in so far as they violated the Civil Service laws, terminated. Thereupon, over objection and exception, he was cross-examined as to whether he had not sought the aid of one Kroll, a Civil Service employee, in support of his own candidacy, and denied that he had done so, his counsel throughout the examination upon this subject objecting that it was collateral and wholly aside from

any proper issue in the cause. This was followed by the production of Kroll as a witness for the plaintiff, and, upon the avowed statement of plaintiff's counsel that he was "distinctly offered for the purpose of contradicting Mr. Warner," and of proving that the latter "sent for a classified Civil Service employee, and solicited his active aid in the forthcoming campaign," the court, over the objection that this was a collateral inquiry, leading to issues not raised by the pleadings and necessarily confusing, and that, under the authorities, such a question could not be gone into for the purpose of reflecting upon the credibility of the defendant, the court said (Rec., p. 69): "One of the ways of judging whether an intent is honest or not is whether a man lives up to it. Intent is the question at issue, and, if you can show that a man talks one way and acts another, then surely that is admissible for the purpose of passing upon the accuracy of what he says, and the truth of what he says * * *. The defendant has given his version of the transaction, and the reasons for it"—*i. e.*, that the portion of the published article which referred to the appellee's participation in the Rockville conference, and defendant's letters to the Attorney General, were induced by his belief that the complainant was violating the Civil Service law. "The plaintiff in the case challenges those reasons, and he seems to me to have the right to say to the jury, 'This is the reason stated. We give you acts which we think are inconsistent with those statements. It is for you to pass upon the truth of the intent.' I think it is admissible."

Thereupon an exception was noted, upon the ground previously stated, "and upon the further ground that it is allowing the jury to make inferences upon inferences. First, they must assume that Mr. Warner is not consistent in his attitude in criticising Mr. Baker about the Civil Ser-

vice; and, secondly, they must infer from that inference that he had some other motive"—*i. e.*, some other motive than that to which he has testified, in publishing the paragraph of the article on which the charge of corrupt obtaining money is predicated. See Catholic University v. Waggaman, 32 App. D. C., 307, 318.

In Murphy v. Packer, 57 Minn., 510, in which the claim was that a mortgage was void because the loan it secured was usurious, defendant's witness had been asked on cross-examination whether he had not stated to plaintiff that he, the witness, had borrowed money of the defendant at a usurious rate, which statement he denied having made, after which the plaintiff, against objection and exception, was permitted to testify that the witness had so stated. The court held that, whether the trial court had abused its discretion in permitting the question to be asked on cross-examination, it was not necessary to decide because, if error, it was error without prejudice, since the witness had denied having made the statement—all of which, perhaps, is applicable to the cross-examination of the defendant in regard to his transaction with Kroll. "But, conceding that the court did not abuse its discretion in allowing the question to be asked of Cook, still, the question relating to a matter wholly collateral to the issues on trial, defendant was bound by Cook's answer, and it was error to allow that answer to be contradicted, when the evidence given to contradict the same might prejudice the defendant. For this error the order appealed from must be reversed, and a new trial granted."

An expert on real estate values who, on cross-examination, denied that several years previous to the controversy he had said that he was not familiar with land values in the community, cannot be contradicted on that point, as it is a collateral and immaterial matter. Pierce v. Boston, 164 Mass., 92-98.

A plaintiff had testified in chief that he was not under the influence of liquor, or intoxicated on the night of the injuries sued for. On cross-examination, he testified that he was not a drinking man—had not been a drinking man for several years prior to the accident, and had never been under the influence of liquor, or intoxicated during the time of his residence in Cheyenne, or during his engagement as Superintendent of the Silver Crown Smelter, in contradiction of which statement, and to discredit the plaintiff's testimony in this respect, opposing depositions were offered. The court said: "Plaintiff's testimony as to his habits of sobriety was brought out on cross-examination, and was clearly a collateral matter. To that extent, therefore, the plaintiff became the witness for the defendant, and his testimony was not open to contradiction, and thereby subject to be discredited. (Citations.)" Union Pacific Ry. Co. vs. Reese, 5 C. C. A. 510, 513.

Where a witness denied having been informed that an injury was caused by a loose wheel, he cannot be contradicted or impeached by proof that he had been so informed. Ry. Co. vs. Conn, 69 Tex. 730.

So where, in an action for personal injuries, an engineer testified that he did not see the plaintiff before he was struck, and did not know of his injury until the following day, the admission of evidence to contradict him, namely, that of a witness claiming that he drew the engineer's attention to the accident and pointed back to the spot where it occurred, was held to be reversible error. "The evidence made an issue before the jury which was not involved in the pleadings of the parties, but which was made the basis of an attack upon the credibility of the witness Hartley, by first examining him with regard to it, and then introducing evidence to contradict his statements made with regard thereto." Ry. Co. vs. Phillips, 91 Tex., 278.

So where the daughter of plaintiff, upon cross-examination, had denied making a statement that the accident was due to her father's fault, evidence was offered and received in the trial court to contradict her. "An approved test of the question whether or not a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove that fact as a part of, and as tending to establish his case? (Citations.) Collateral facts are defined as 'those which afford no reasonable inference as to the principal matter in dispute.' (Citation.) * * * The defendant was not entitled to prove, as a part of his case, that she had said 'it was her father's fault,' nor would the fact that she had expressed such an opinion, if proven, afford any reasonable inference as to the principal matters in dispute."

This test seems to have been first applied in Attorney-General vs. Hitchcock, 1 Exch. (Welsby, Hurlstone & Gordon) 91.

It has been recognized and applied in Hildeburn vs. Curran, 65 Pa. St. 59, 63; People vs. Chin Mook Sow, 51 Cal. 597; Williams vs. State, 73 Miss. 820-5; George vs. State, 16 Neb. 318, 321; Butler vs. State, 34 Ark. 480, 485; Johnstone vs. Spencer, 51 Neb. 198, 202; Welch vs. State, 104 Ind. 347, 351; State vs. Goodwin, 32 W. Va. 177, 181-2; and the cross-examination of a party for the purpose of discrediting his evidence is governed by the same rules as that of any other witness. Schwantes vs. State, 127 Wis. 160, 182-3; Union Pac. Ry. vs. Reese, *supra*.

Applying this test to the case at bar: Would the plaintiff have been entitled to prove, as a part of his case, that the defendant had attempted to employ Kroll in aid of his candidacy, in violation of the Civil Service rules, in an action where the issue was whether the defendant had libeled the plaintiff by charging him with corruptly em-

ploying his office as United States District Attorney for the purpose of obtaining contributions for political campaign purpose from the Jockey Club, or the bookmakers? The mere statement of the question renders discussion of it unnecessary.

The court's ruling was erroneous on still another ground. It submitted to the jury for determination, upon the evidence of Kroll upon the one side and that of the defendant and Esterly on the other, whether Kroll had first seen Warner in response to the latter's postal card, which is Kroll's version, or whether Kroll had been in communication with Warner and in his company prior to the date of that card, in the effort to secure official promotion or transfer—this as affecting their relative credibility; and a further issue, equally collateral to any presented by the pleadings, whether the testimony of the defendant, or of Kroll, was entitled to greater credence over the question whether Warner had or had not sought the services of the latter in aid of the former's candidacy, in violation of the Civil Service rules. If the jury accepted Kroll's testimony in preference to that of Warner and of Esterly, finding that Warner sought the aid of Kroll, in violation of the Civil Service rules, then, according to the Court's ruling, they were at liberty to infer that Warner was insincere or untruthful in alleging that his reflection on plaintiff's attendance at the Rockville convention, and his letters to the Attorney General, were because of his belief that the plaintiff had violated the spirit and letter of the Civil Service rules; and, if they reached this inference as to his insincerity and his want of credibility, they might further infer that his testimony as to his intent and meaning in the paragraph of his publication, "How about the race-track?", was in like manner untrue. See Catholic University v. Waggaman, *supra*.

XI, XV.

The exception to the granting of the first instruction asked on behalf of the plaintiff, and to the rejection to the defendant's first instruction, may be considered in connection with each other.

Plaintiffs' first instruction (Rec., pp. 72-3), granted by the court, was that, if at the time of the publication, the plaintiff was United States District Attorney for the District of Columbia, that there was a race-track in the District at which races of horses were being had, that wagers were being made at that track on the results of the races, that *some persons believed* or claimed that such laying of wagers could be prevented by prosecutions in that behalf by the plaintiff as such District Attorney, that he did not prosecute the layers of such wagers, that the defendant was engaged in a contest for nomination as a candidate for Congress for the district embracing Montgomery County, that Pearre was his opponent in that contest, that the plaintiff supported Pearre and opposed defendant, and that the defendant wrote and published the article, then, *upon those facts, without more*, the verdict of the jury must be for the plaintiff, the only question for their determination being the amount of damages which should be awarded.

In order to sustain the granting of this instruction by the court, or a recovery in this case, it must be held that, as a matter of law, the publication means, on its face, not merely that the money to beat Warner came from the race-track, but that the *plaintiff* was obtaining it, *by non-prosecution of the bookmakers there*, no basis for either of which charges is declared in either the inducement or the colloquium, and neither of which, therefore, under the authorities heretofore cited was contained in the declaration. Neither averred that the Jockey Club, or the bookmakers, were sources from which the plaintiff, by reason

"The averment of extrinsic matter, in this declaration, was for the purpose of showing that the libel was published, as it is expressly alleged to have been, 'of and concerning the plaintiff.' And whether it was so published or not, is a question of fact, which it is the province of the jury, and not of the court, to decide. This has been so held in a great number of instances; and is so reasonable and just a rule that it cannot fail of receiving universal assent. Were the law not so, the jury, in case of libels, would be nothing, and the court everything. In England, until lately, the court assumed the exclusive right to determine whether the writing was or was not libelous. If the meaning *and application* of the libel is also to be determined by the court, it will be going one step further; and nothing would remain for the jury but the single and rarely disputed fact of publication." Van Vechten vs. Hopkins, 5 Johns, 221.

The trial court further erred, we submit, in taking altogether from the jury the determination of the meaning of the article, on which depended the question whether or not it was libelous *per se*—this error occurring both in granting plaintiff's first and in denying the defendant's second instruction.

The latter instruction (Rec., p. 75) was, in effect, that, if the jury should believe from the evidence that the intent of the article was to inquire what the complainant was doing or intended to do about the operations of the bookmakers then in progress at the race-track, and to suggest or complain that his time and attention should be directed to their prosecution and to the suppression of their operations rather than to the contest for the Republican nomination for Congress in Montgomery County, Md., and that the said intent, comment and criticism were fair and reasonable under the conditions then existing at the race-track

and the operations of the bookmakers then being carried on there, their verdict should be for the defendant.

It is quite obvious that the publication in question, taken alone, without allegation or proof of extraneous facts, is not *per se* libelous. When we come to consider the extraneous facts which are relied upon to make it so, they embrace, not only those enumerated in the plaintiff's first prayer—some alleged and some not alleged in the declaration—but those set forth both in the testimony for him, *supra*, pp. 10-13, and that for the defendant, *supra*, pp. 22-4.

Following the publication of March 28th, sued upon, the defendant, on March 30th, the day before he first knew, as he testified, that his article was open to the construction placed upon it by the suit, he had published the article of March 30th (Rec., p. 14), in which, again referring to the visit of the appellee to a conference at Rockville, "where a general discussion was indulged in as to how Warner could be beaten," followed the inquiry,

> "Why not stay at home and try to close the race-track scandal?"

Upon this record, erroneously we submit, the trial court took from the jury the question whether the meaning of the article of March 28th should be construed as claimed by the plaintiff, or as claimed and testified to by the defendant.

> "It is for the court to determine whether a publication is susceptible of the meaning ascribed to it by the innuendo, and for the jury to find whether such meaning is truly ascribed to it." Barnes vs. State, 88 Md., 351, citing Averitt vs. State, 76 Md., 522.

It is not questioned that, where the publication *alone* imputes a crime, or the like, and there are not extraneous circumstances in the light of which that meaning may be restrained or explained, the court may take from the jury the question or libel *vel non* and itself determine that question. It is believed, however, that no case can be found in which, the publication not being libelous *per se* independently of extraneous circumstances, or where, if so, there are extraneous circumstances tending to show that it may have been intended, and received, in a non-libelous sense, the the courts have held the question to be one of law, and have excluded it from the jury.

Among the extraneous facts admitted in the case were that there was a public agitation from early in March until the middle of April, against permitting the bookmakers to operate at the race-track; that public officials, private citizens and the press were insisting that the plaintiff should institute further prosecutions, and that the article sued upon was published while this public agitation was going on; that (Rec., p. 24) the plaintiff had refused the request of the Commissioners to prosecute; that the press and public and private citizens were intimating that the Walters indictments were defective in a particular which could be cured; that the plaintiff paid no attention to these intimations, and that the air had been full of the race-track business for a long time past; that objections were coming from every class in the community, all centering on the office of the District Attorney; that the protest came not only from citizens, but from the Commissioners and through the public press, and that the Corporation Counsel of the District of Columbia had given the defendant an opinion that other prosecutions could be brought which would govern the case.

That, under these conditions, the inquiry "How about the race-track?" meant, and could only mean, as a conclusion of law, that the plaintiff was obtaining money from the race-track as a consideration for not prosecuting the bookmakers, even if this had been alleged in the declaration, we submit was error.

In Smith vs. Commercial Publishing Co., 149 Fed. (C. C. A., 6th Circuit), 704, the alleged libel was the following:

"Murderer Arrested.

"Sheriff Marshall Patterson arrested Fred Smith, camped in a tent two miles north of Augusta, on White River. Smith is wanted at Kennett, Mo., for killing old man F. E. Porch, the incentive being robbery. The State of Missouri offered $300, the County $200 and the citizens of Malden $600 for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

The innuendo was, "that the said plaintiff was a murderer; that he had murdered an old man named F. E. Porch, for the purpose of robbing him; that a reward was being offered for the arrest of said plaintiff, and that he, the said plaintiff, on being arrested, did not deny that he was the man wanted." The declaration admitted the arrest by the Sheriff, but alleged that each and all of the remaining allegations of the publication were false.

The third plea, upon which the decision turned, was as follows:

"For further plea, filed by leave of court, the defendant says that the plaintiff was arrested by Sheriff Marshal Patterson in a tent near Augusta, Arkansas, on a charge of murder, and on the belief by the sheriff that he was guilty of that offence, and that the plain-

tiff did claim that he did not do the killing for which he was arrested. The substance of the publication is that the plaintiff was arrested on the charge of murder, and that he claimed that he was innocent of the charge. The sheriff may have made a mistake in the matter. The defendant says the article complained of did not state that the plaintiff is guilty of murder, nor does the language used bear that meaning. It only says and means, in substance, that the plaintiff was arrested on the charge of murder. Wherefore the defendant pleads this special justification as to the truth of the words referred to in bar and defence of this action."

This plea, it will be observed, is substantially similar to the amended plea offered by the defendant, and disallowed by the court on the ground that the defence set up in it could be made under the general issue (Rec., p. 56)—although the court excluded the defence set up by the plea in so far as the public press was concerned (Rec., pp. 50-5).

The trial court in Smith vs. Commercial Publishing Co. charged that the article was libelous *per se*, and left to the jury only the question whether the defendant published it, whether it was untrue, and—unlike the trial court in the case at bar—whether *"it was published of and concerning the plaintiff,"* all of which issues were determined by the jury in favor of the latter. The Circuit Court of Appeals, by Mr. Justice Lurton, in reversing the judgment, said:

"The court was asked to submit to the jury the meaning of the article with an instruction that, if they found that the item 'only charged or conveyed to those who read it the meaning that the plaintiff was arrested by the sheriff on the charge of murder, and that the plaintiff claimed that he was not guilty thereof,' that these words, under such a meaning, would not be libelous and actionable if you find that the plaintiff was in

fact arrested by the sheriff for murder, although the sheriff made a mistake by so doing.' This charge was denied. This was error. A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would understand it. So the whole item, including the display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as reasonably to bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable, and the other not, it is for the jury to say, under all the circumstances surrounding its publication, *including the extraneous facts admissible in evidence*, which of the two meanings would be attributed to it by those to whom it is addressed, or by whom it may be read. (Numerous citations.) * * * The court relieved the jury of all discretion in the matter of the signification of the printed words by the instruction set out, and by the refusal to give the instruction asked. In Stuart vs. Blogg, cited above (10 Q. B., 908), and quoted with approval by Lord Shelburne in Capital Counties Bank vs. Henry, cited above (7 App. Cases, 741-4), it was said by Wilde, C. J.: 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by the innuendo; but, where the judge is satisfied of that, it should be left to the jury to say whether the publication has the meaning ascribed to it.'"

"If it be decided by the court that the words are susceptible of the meaning the plaintiff in the innuendo seeks to ascribe to them, then it becomes a question for the jury to determine, under all the circumstances, whether they were intended to mean what the innuendo avers they did." Gaither vs. Advertising Co., 122 Ala., 458.

This court has repeatedly determined the impropriety of withdrawing a case from the jury when there is any room for differences of opinion among reasonable men, or any questions of fact to be found.

XII.

The twelfth assignment of error in the Court of Appeals, on behalf of the defendant, was to the granting of the plaintiff's second instruction, at page 73 of the record, to the effect that, if the jury believed from the evidence that the plaintiff published the article, then, upon that fact alone, he was entitled to recover compensation, for the injury done to his reputation "by the tendency of such publication to bring him into disgrace and disrepute," and for the mental suffering, if any, suffered.

The considerations stated in connection with the last preceding exceptions are applicable here, and need not be reiterated.

XIII.

The thirteenth assignment of error in the Court of Appeals was to the inclusion, in the plaintiff's third instruction, not only of such damages as were proper to be assessed as compensation to him, and by way of punishment to the defendant, but, also, such damages as the jury should believe the defendant ought to pay "as an example to others."

In the text books and the decisions it is not unusual to refer to exemplary or punitive damages as those which may be imposed, in particular cases, where a defendant has acted wilfully and maliciously, as a punishment to him and as an example to others. No case, however, it is believed, exists in which, after a direction to allow such damages as would fairly and reasonably compensate the plaintiff and such further damages as would properly punish the

defendant, the jury has been instructed to go further, and to award, in addition to compensatory and punitive damages, a further sum to serve as an example to others. It is punitive *or* exemplary damages, not punitive *and* exemplary damages, which are allowable in such cases.

The objection in question was distinctly and specifically pointed out, as the ground of objection, at page 74 of the record, so that it is not a case of mere inadvertent, unintended inaccuracy of language. The jury were told designedly, over the specifically stated objection, that all three of these elements were to enter into the measure of damages in the case if punitive damages were given, and the counsel for the plaintiff were, accordingly, enabled to expatiate upon them as three separate and distinct bases or grounds for swelling the damages to be awarded. It is respectfully submitted that there is no authority, nor any legal principle, upon which, in addition to compensation and to punishment, there may be imposed upon a defendant a further and additional *quantum* of damages based upon the speculative conclusion of a jury as to what sum, in addition to compensation and suitable punishment in the particular case, may be necessary, *pro bono publico*, to frighten or deter others.

XIV.

Not satisfied with this triple measure of damages once allowed in his third instruction, the plaintiff, in his fourth instruction (Rec., pp. 74-5), applied for and obtained, over the like objection and exception, an instruction for the allowance of fair compensation, and "such other and further damages as, in your opinion, may appear as a punishment" of the defendant, "and as an example to him *and others* in respect of composing such or similar articles in the future."

This fourth instruction was, as was in like manner specifically pointed out in the objection, further objectionable and erroneous in that it invited the jury to find that the defendant had been guilty of reckless indifference, and therefore was a proper subject for such a threefold imposition of penalities, by inquiring whether the defendant had exercised reasonable care "to have ascertained the truth or falsity of the said article, and the presence or absence of probable cause therefor," without any attempt at evidence in the case either for or against the proposition that he had failed to use any and all means and opportunity to ascertain the truth or falsity of the article in the sense, which according to the testimony in the case, he intended to be placed upon it.

In other words, instructing the jury as a matter of law that the article charged the plaintiff with corruptly obtaining money from the race track people in consideration of his omission to prosecute them, of which charge the defendant testified that he had never supposed or intended to intimate that the appellee was guilty, they were further instructed by the prayer in question that, if the defendant did not exercise reasonable care to ascertain the truth or falsity *of such* a charge, so found by the court as a matter of law to be contained in the article, and which charge the defendant testified he neither intended to make nor believed to be true, he was a proper object upon which to impose compensatory damages, plus punitive damages, plus such additional damages as would serve the purposes of deterring others from similar conduct, on the ground that a conjectural failure, in the absence of any attempt at proof of it, to ascertain the truth or falsity of a charge which the defendant testified he had never believed or intended to make, was a sufficient ground upon which to convict him of wilful

and reckless disregard of the rights of the plaintiff, and this whether or not they believed his testimony that he had never intended to make the charge in question.

XVI.

The sixteenth assignment of error was to the court's refusal to instruct the jury that the defendant, in common with the public generally, had the right to criticise or comment upon the plaintiff's inactivity in the matter of further proceedings against the bookmakers at the race-track, notwithstanding the decision of the court in the Walters case, provided they should find from the evidence that there was reasonable ground for difference of opinion as to whether his hands were in fact tied, as he claimed, or whether it was in fact necessary or proper for him to refuse warrants against the bookmakers in a further attempt to suppress their operations, provided such criticism or comment was fair or reasonable under the circumstances shown by the evidence. Of course, if the defendant had not this right of public comment, under the circumstances shown by the evidence and referred to in the prayer, then, upon his own theory and testimony as to his intent in the article complained of, it was indefensible. This, it is submitted, is clearly not the law.

XVII.

In refusing the defendant's fourth requested instruction (Rec., p. 76), the court, in departure from the principles and authorities collected in this brief upon the relative functions of the court and jury, refused to content itself with determining "the question of logic," or "the legitimate conclusion of law," whether the words used were reasonably or legally susceptible of the meaning attributed to

them by the innuendo, and refused to permit to the jury the exercise of their function in that regard as established by the authorities in question, by determining whether the words of the article referred to in that instruction were in fact used in the sense and meaning attributed to them in the innuendo, or in the sense and meaning testified to by the defendant.

The words in question were that a Justice of the Supreme Court of the District of Columbia, with the United States District Attorney, had gone to Rockville "to attend a conference of Mr. Warner's enemies, and determine what ammunition was needed to defeat him." The innuendo attached to these words the meaning of "determining what funds were necessary, *and how the same should be raised*, to be used in the campaign on behalf of the said Honorable George A. Pearre against the said Brainard H. Warner." The defendant testified (Rec., p. 57) that the words in question were employed as "an explanation to the readers to show why they went there, the defendant having information that the United States District Attorney acted as floor manager at that conference and asked representatives from the different districts how much money and what other means were necessary to defeat the defendant, the representatives being called up one by one and sent out into the hall to get the necessary ammunition"—the same having been already "raised," as was further shown by the testimony on both sides at the trial. The language of the article was, "what ammunition was needed," not how it should be raised; notwithstanding which fact the court refused to leave it to the jury to determine the meaning with which the words were used in the article.

VIII. XVIII.

As heretofore pointed out, the plaintiff offered in evidence, in addition to the article of March 28th, the advertisement of March 30th, printed at page 14 of the record. The latter article went in without objection, upon the specific statement of his counsel that everything in that issue of the paper which related to the race-track should go in. Subsequently, as also above pointed out, the court allowed plaintiff's counsel to limit their offer to the *defendant's advertisements in the Herald;* and, when plaintiff's counsel offered in evidence an article in the issue of March 28th, the very issue containing the alleged libel, everything in which issue his counsel had stipulated should go in, the court, under objection, excluded it (Rec., pp. 54-5).

Thereupon, at page 57 of the record, and as bearing upon the only question which the court's ruling had left in the case, namely: whether the damages should be compensatory or punitive, the defendant was allowed to explain his intent and meaning in the article of March 28th, as was plainly his right, under the authorities.

> "The motives or purpose with which the words were spoken lie at the very foundation of malice They are the very conditions upon which exemplary or punitive damages are predicated, and no good reason appears why defendant should not be permitted to prove what his motives were." Callahan vs. Ingram, 122 Mo., 355, 373. See, also: Odgers on Libel and Slander, 317; Starkie on Slander and Libel, Sec. 369; Townshend on Slander and Libel, Sec. 91; Bennett vs. Smith, 23 Hun., 50, 53; Wilson vs. Newman, 35 Wis., 321, 353, 361; Wynne vs. Parsons, 57 Conn., 73, 81.

Upon coming to the article of March 30th, however, the defendant was not allowed to testify as to his intent and

purpose in writing and publishing that article, the court saying that it had allowed testimony as to the intent in writing and publishing the article of March 28th to go in, because it had ruled that article to be libelous *per se;* that it did not so rule as to the article of March 30th; that the other side presumably had some motive in offering the latter article; that the court did not know what that motive was; that it saw no relevancy of any explanation about it; that the article explained itself, and that the objection was sustained, to which ruling the defendant duly excepted (Rec., pp. 59-60), and which exception was the basis of defendant's eighth assignment of error in the Court of Appeals, to the action of the trial court.

In the argument to the jury, defendant's counsel, assuming from the foregoing that the article of March 30th was regarded by the court as not libelous *per se*, and as needing no explanation, but explaining itself, argued to the jury that since, if they believed his testimony, this latter article was published at least twenty-four hours before he first realized that his article of March 28th was exposed to the construction put upon it in the suit, the article of March 30th inquiring with reference to the United States District Attorney "Why not stay at home and try and close the race-track scandal?", was corroborative of his testimony as to what he intended by the expression "How about the race-track?" in the March 28th article (Rec., pp. 77-8). Thereupon, in the closing argument to the jury, counsel for plaintiff (Rec., p. 78) said, in reference to the article of March 30th, "The inquiry of this publication was, 'Why not stay at home and prosecute the race-track scandal?', 'Why not stay at home and close the race-track scandal?' That is what the article says, *and that is why we put it in. Why not stay at home and try to close the race-track scan-*

dal? namely, the scandal I exposed in the article of March 28th."

The scandal exposed in the article of March 28th, according to the contention of plaintiff's counsel, which had been sustained by the court, was the scandal of an alleged corrupt obtaining of money from the race-track people, in consideration of their not being prosecuted. The article of March 30th, as counsel for plaintiff thus stated to the jury, expressed that same meaning as he contended, and he had put it in evidence for the purpose of so contending. Then followed the objection to this line of remark, and the discussion concerning it, occupying pages 78 to 80 of the record, resulting in the court's ruling that it was proper or allowable comment, and that the objection was overruled, to which an exception was duly noted. The fact, therefore, remained that the jury were told, with the court's approval, and as the last word in the case, that the article of March 30th, which the defendant had sought and had been denied the opportunity to explain, was a re-iteration of the libel of March 28th, and that the libel, therefore, had been uttered, not once, but twice, with the resulting responsibility therefor, and with inevitable increased appeal to the minds of the jury for the allowance of punitive damages.

If the remarks of defendant's counsel in reference to the article of March 30th, though based on the court's ruling that it was not libelous and needed no testimony as to its meaning, were nevertheless in any way improper, it was the duty of the plaintiff to object, and of the court to order their withdrawal and to instruct the jury to disregard them. "The fatal error committed here consisted, not only in the fact that the language used was clearly prejudicial, but that it went to the jury with the approval of the court." Pickford vs. Hudson, 32 App. D. C., 480, 487-8.

The preparation of this brief is embarrassed by the fact that, up to the time when placing it in the hands of the printer can no longer be deferred, publication of the plaintiff's brief has been delayed. We can, in consequence, reply here only to such propositions on his behalf as were advanced in the Court of Appeals.

It was argued on behalf of plaintiff in that court that the defendant's motion below to direct a verdict, on the ground that neither the inducement nor the colloquium of the declaration set forth a cause of action, was not before the court, notwithstanding exception duly taken to its disallowance, because (1) of the omission of defendant's counsel to argue the objection upon the motion in arrest of judgment, and (2) because a motion to direct is in the nature of a demurrer to the evidence, upon which demurrer only the evidence, and not defects in pleadings, can be considered.

1. The Record (p. 72) shows that, at the trial, the contention on behalf of the defendant was duly argued to the court, and overruled. The proposition that the omission to re-argue the same question, before the same court, in connection with the motion in arrest a few days later, is an abandonment of it, is supported by no authority, and we submit is equally without foundation in reason. The court below did not regard it as abandoned, but overruled it, from which action the defendant noted his appeal in open court (Rec., p. 11). Even if the question had been raised only by the motion in arrest, and if greater accuracy of expression should have been used in excepting to the overruling of the motion, an appellate court will not by too technical a construction preclude itself from correcting manifest error. Dunlop v. R. R. Co., 130 U. S., 653. The point, however, is amply presented by the motion to direct and the exception to its denial, by the motion in arrest, and by the writ of error.

2. In the cases in which a motion to direct a verdict has been referred to as in the nature of a demurrer to the evidence, the motion was actually of that character. In the case at bar, the motion to direct was not at all directed to the evidence, but was presented specifically upon the ground that the declaration, under the well-established rules relating to actions of slander and libel, did not state a cause of action. The proposition that, where this is the case, the court may nevertheless validly proceed to verdict and judgment against the defendant, over his objection and exception, is incapable of being sustained.

Bank of the United States v. Smith, 11 Wheat., is of itself decisive of the question. In it this court said:

> "The doctrine of the King's Bench, in England, in the case of *Cort v. Birbeck* (Dougl. Rep., 208), that, upon a demurrer to evidence, the party can not take advantage of any objections of the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. *And the only question is* whether the evidence is sufficient to maintain the issue. And the judgment of the court upon such evidence will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But, the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his favor, may avail himself of all defects in the declaration that are not deemed to be cured by the verdict."

The alleged defect, which the court thus found examinable upon appeal though not raised at all below, was whether, in an action against indorsers of a promissory note, the

declaration sufficiently alleged demand of payment of the maker.

A fortiori, a defendant against whom, over his timely and specific objection and exception, a judgment has been rendered under a declaration which states no cause of action against him, and who presents the whole record on writ of error to the consideration of the appellate court, "may avail himself of the defect," which clearly is one not curable by verdict.

That a defect of this character may be raised in the appellate court by writ of error, without demurrer, motion in arrest or other proceeding below, see *supra*, p. 46. To like effect is Cort v. Birbeck, Doug. Rep., 223-4; Telegraph Co. v. Sklar, 126 Fed., 295, 302. And see Clement v. Fisher, 7 Barn. & Cress., where the question was raised only by writ of error.

At pages 4-5, *supra*, eight charges of the innuendo are set out, not one of which, as is there stated, is contained in either the inducement or the colloquium. Without these charges, or some of them, it is impossible to make out a cause of action.

The argument *ab inconvenienti*, from the fact that the objection was made at the trial, is untenable. It was the right, as it was the duty, of defendant's counsel to call attention to the defect, however lately discovered before verdict; nor was there any hardship or inconvenience, since, under the rules of the trial court, leave to amend might have been applied for and granted at the trial. As pointed out in the opinion of the Court of Appeals (Rec., p. 95), the plaintiff elected to stand upon his declaration after specific notice of the defect and with ample opportunity to cure it, and therefore presents no case of hardship. The necessary amendment would have involved neither delay nor expense.

The brief for plaintiff in the Court of Appeals confine itself upon this point principally to the contention that the declaration need not allege the actionable words to have been spoken of the plaintiff, if this sufficiently appears; but no controversy of that character exists in the case. The defendant's objection was, not that the inducement and colloquium failed to state that the words were published of or concerning the plaintiff, but that they were wholly silent as to each of the several features mentioned in the innuendo, specified at pp. 4-5, *supra*, without which, or without some of which, there was no libel.

To the unbroken line of authorities cited at pp. 36-46 above that such a defect is fatal, the only apparently opposing citation is Chase v. Sherman, 119 Mass., 387, 391, to the effect that the objection must be raised by demurrer; but, as will be seen by reference to Clay v. Brigham, 8 Gray, 161, cited in Chase v. Sherman as the authority for the proposition in question, this is because the Massachusetts statute so provided. In the absence of a statute, the current of authority upon this subject is unbroken by a single exception. The rule was the same in Massachusetts until the statute there changed it. (Bloss v. Tobey, 2 Pick., 320; Carter v. Andrews, 16 Pick., 1, 8.)

The very paragraph of Newell on Slander and Libel, p. 613, cited for plaintiff below, concludes with the statement: "It is a familiar doctrine that innuendoes do not enlarge, but merely state in plainer terms, the meaning of the language which precedes them."

The quotation from Newell at p. 603, as cited below, inadvertently omitted from the end of the last sentence but one quoted, after the words "it must be expressly stated that such matter existed," the further pivotal requirement, "*and that the defamation related thereto.*" In this very particular, as was specifically pointed out to the trial court

and to counsel at p. 72 of the Record, the declaration is fatally defective, in that in neither the inducement nor the colloquium, in which alone the cause of action must be contained, is there any statement that the words were written with any reference to the non-prosecution of the race-track gamblers by the plaintiff, or to the non-performance of any official duty by him, or with reference to the obtaining of money from the Jockey Club, or to that club, or to its race-track, or to the races conducted there, nor does either expressly state, or state at all, any other "outside or extrinsic matter" to which the alleged "defamation related."

A distinction between the authorities cited for the defendant and the case at bar was attempted below, based upon the assumption that, in the latter, the inducement and colloquium, without the innuendo, set forth a libel actionable *per se*. That the assumption cannot be sustained abundantly appears, we submit, from the examination of the inducement and colloquium contained at pp. 4-6, 36-46 of this brief, and the authorities there collected. That, if the colloquium and inducement fail to state a cause of action, their failure to do so cannot be "eked out" by the innuendo, seems to be conceded, and at all events is certainly the law. No proof of special damage being offered, the motion to direct could be denied only on the ground that a libel *per se* was alleged and proved.

II. If the newspaper publications of March, 1908, and the testimony of the defendant that he had read them and that he wrote the article sued upon in the light of the fact that they were being published without contradiction, refutation or denial, were offered for the purpose, as was suggested in the plaintiff's brief below in connection with the 4th and 5th assignments of error, of contending that other

libels are neither justification nor mitigation of damages, it will readily be conceded that neither of those assignments of error is tenable. The very different object and purpose for which the testimony was offered were stated to the trial court (Rec., pp. 48-50, 57), and the error of its rejection, we submit, is clearly shown upon the considerations and authorities set forth in pages 48-57 of this brief. The trial court having already ruled that the article was libelous *per se*, the defendant, accepting that ruling, as he was bound to do, as the law of the case in that court, subject to his exception thereto, was, in offering the testimony, necessarily restricted to the purposes stated on the record.

The defendant's insistence that the newspaper publications referred to and relied upon by plaintiff's counsel as creating "the atmosphere" of the case should be read to the jury before closing the plaintiff's testimony, and that the extracts which it had agreed might go in should be limited to publications relating to the controversy, we submit was proper, and in no way affects the validity of the assignments of error in this regard.

III. In plaintiff's brief below it was objected, and apparently correctly, that exception was not taken to the cross-examination of defendant in regard to his relations with the witness Kroll. The Record does show, however (pp. 65-67), that from the beginning and throughout his cross-examination upon that subject objection was made and insisted upon, and plaintiff's counsel warned, that the cross-examination was upon a collateral question, that it was entirely inregard to a collateral matter, and that it was losing sight of the issue in the case in an inquiry into a collateral matter. When in rebuttal, in contravention to the rule that one who cross-examines as to collateral matter is concluded by

the answers and cannot introduce independent proof concerning it, the witness Kroll was called in contradiction, both objection and exception were specifically taken (Record, 68-70). The rulings of the trial court upon this question, and the effort in the opposing brief below to sustain them, were based upon the claim that the testimony went to the credibility of the defendant as to the intent with which, according to his testimony, he published the article sued upon.

We have no quarrel with the authorities cited below to the effect that, where the intent with which an act is done is material, evidence to prove the intent is admissible. But what relevancy has that proposition to the present inquiry?

The act for which damages are sought to be recovered in this action from the defendant was the publication of March 28, 1908. The issue as to intent was, whether by that article the defendant intended to charge the plaintiff with obtaining money for political purposes from race-track bookmakers, in consideration of his omission to prosecute them. The article, even under the innuendoes, contained no reference to violations of either the letter or the spirit of the Civil Service law. The cross-examination of the defendant in regard to the communications addresed by him to the Attorney-General in reference to such alleged violations, although not referred to in the pleadings nor an issue in the case, was, perhaps, justifiable for the purpose of showing hostility or unfriendliness, but could have no legitimate bearing upon the question whether the alleged libel was intended to charge the corrupt obtaining of money, or, as was contended by the defendant, a want of diligence in the suppression of the race-track evil.

Even if the defendant's letters to the Attorney-General complaining of alleged violations of the Civil Service law had constituted the alleged libel in controversy, proof of

objection to the newspaper articles proffered on behalf of the defendant, when offered formally for the record." (Record, p. 49.) Then followed the offer of the newspaper articles, the rejection of them, and exceptions duly entered on the minutes. Counsel for plaintiff then objecting that the court's ruling was sustainable upon the further ground that the state of the pleadings did not permit their admission, defendant offered a special plea to overcome that objection, which amendment was denied by the court on the ground "that the defense set up in it could be made under the general issue, and that the article sued upon was not susceptible of the interpretation given," to which ruling exception was duly noted. In other words, the court ruled the defense admissible on the question of pleading, without exception by the plaintiff, but ruled, further, that the article was libelous *per se*, to which ruling exception was prayed by defendant, allowed and entered upon the minutes. The precise question was again presented by the rejection of the defendant's second instruction, to which, also, exception was duly taken and noted. (Record, pp. 73-4.)

The granting of the plaintiff's first instruction (Record, pp. 72-3), also duly excepted to, was a further ruling that the article, upon the finding of certain extraneous facts, of which that numbered "4" was not alleged, even in the innuendoes of the declaration, was libelous *per se*.

If the publication in the case at bar as manifestly charged obtaining money from the bookmakers in consideration of their non-prosecution as the language in Mattice v. Wilcox, 147 N. Y., 624, 626, cited for plaintiff below, charged professional incompetency or inefficiency, or as the publication in Hanchett v. Chiatovich, 101 Fed., 744, quoted below, tended to injure plaintiff in his trade and cause him to be shunned and avoided by the defendant's employees, or as the publication in Royce v. Maloney, 58 Vt., 437, charged that the plaintiff, while a judge, was

under retainer to espouse the cause of a railroad company, the cases are correspondingly persuasive and in point. We submit that they are not analogous, and that Smith v. Commercial Publishing Co., 149 Fed., 704, which plaintiff below sought neither to distinguish nor to answer, was a case in which the language of the publication was far less ambiguous than that in the case at bar.

With respect to plaintiff's contention below in reference to the defendant's exception to the rulings of the trial court respecting the publication of March 30th, that article, printed at p. 14 of the Record, was offered in evidence by the plaintiff without objection, upon the specific statement of his counsel that everything in that issue of the paper relating to the race-track should go in. (Record, p. 14.) Subsequently, as already shown, plaintiff's counsel were allowed to limit their offer to the defendant's advertisements in the *Herald*, and everything in even the issue of March 28th was excluded except his advertisement of that date. When the defendant, pursuant to the right to explain accorded him by all the authorities, undertook to testify as to his intent and purpose in writing the article of March 30th, thus put in evidence by the plaintiff, the court, under objection by the plaintiff's counsel, and subject to defendant's exception (Record, 59-60), excluded explanation or testimony of intent or meaning, on the ground that the article was not libelous, and that it explained itself. (Record, 59-60.) Upon the argument to the jury defendant's counsel accordingly referred to that article as, in the only non-libelous construction of which it was capable, corroborating the plaintiff's testimony of his intent in the article of March 28th, as referring to the plaintiff's inactivity in the prosecution of the race-track gamblers. In reply, and in the closing argument to the jury, his counsel, referring to the expression in the article of March 30th, "Why not stay

at home and close the race-track scandal," said: "That is what the article says, *and that is why we put it in.* Why not stay at home and try and close the race-track scandal? namely, *the scandal I exposed in the article of March 28.*"

The scandal exposed in the article of March 28th, as the plaintiff contended and the trial court ruled, was the scandal of obtaining money from the race-track people for political purposes, in consideration of the plaintiff's omission to prosecute them. Plaintiff's counsel was, therefore, permitted in the closing argument to the jury, to which no reply could be made, to contend that the defendant not only made the libelous charge in the article of March 28th, but that the language of March 30th had the same meaning, and was a repetition of the libel.

It is no answer to this serious and hurtful error to say, as was attempted below by paraphrasing the language of the trial court in overruling the objection, that the court was not permitting counsel to argue that the article of March 28th was libelous. Counsel *was* so arguing; the court held that he was entitled to make that argument; it remained before the jury, with the court's approval, and there was nothing in the language of the Court in overruling the objection which cured the error, or relieved the defendant from its consequences.

It is respectfully submitted that, with respect to each of the rulings of the trial court held by the Court of Appeals to be error, and to each of those rulings not passed upon by the Court of Appeals, but excepted to by the defendant in error and discussed in this brief, there was fatal error, and that the judgment of the Court of Appeals, both in reversing the judgment of the trial court and in directing that the motion in arrest should be sustained, was correct and should be affirmed.

J. J. DARLINGTON,
W. C. SULLIVAN,
Attorneys for Defendant in Error.